Supreme Court, U.S
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No.

In The

Supreme Court of the United States

October Term, 1997

JOAN MAY, WILLIAM FELICELLI, JOHN RIELLY, PETER CHADMAN, VIRGINIA OGLESBY and DAVID HOLUBETZ,

Petitioners,

vs.

TOWN OF MOUNTAIN VILLAGE, a Colorado Municipal Corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

May a municipality extend the right to vote to non-residents, and thereby dilute the vote of residents, solely on the ground that it has a rational, rather than a compelling reason for doing so, in violation of long established Supreme Court law that requires strict scrutiny for governmental elections?

May a municipality invalidate, by majority vote, the long established Constitutional requirement that all voter qualifications for governmental elections other than residence, age and citizenship, must be strictly scrutinized?

May a municipality extend the right to vote in municipal elections to non-residents, and thereby dilute the vote of residents, solely on the basis of their ownership of 50% of the fee of real property located within the municipality without establishing a compelling governmental interest in doing so?

May a municipality extend the right to vote to non-residents, and thereby dilute the vote of residents, solely on the basis of ownership of property within the municipality, while denying the right to vote to non-residents who have an equal or more substantial non-wealth based interest in municipal elections and governance?

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Appendix A — Opinion Of The United States Court Of Appeals For The Tenth Circuit Dated December 19, 1997 ..... 1a

Appendix B — Order Of The United States District Court For The District Of Colorado Dated October 18, 1996 ..... 17a

Appendix C — Order Of The United States Court Of Appeals For The Tenth Circuit Filed January 23, 1998 ..... 30a

Joan May, William Felicelli, John Rielly, Peter Chadman, Virginia Oglesby and David Holubetz respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra* p. 1a) is reported at 132 F.3d 576. The opinion of the district court (App. B, *infra* p. 17a) is reported at 944 F. Supp. 821. The Order denying Petitioners' Petition for Rehearing (App. C, *infra* p. 30a) is unreported.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on December 19, 1997 and denied the Petition for Rehearing on January 23, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution as follows:

> . . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On March 7, 1995, the residents of the Town of Mountain Village, Colorado, approved a Home Rule Charter by a vote of 40 in favor and 13 opposed. That Home Rule Charter, Section 2.4(b), granted the right to vote in Town elections to owners of real property situate within the Town, who are not legal residents

of the Town, so long as such owners: (a) have been owners of record for at least 30[1] days preceding the election; (b) during the 30 day period owned at least 50% of the fee title; (c) are at least 18 years old on the date of election; and (d) are natural persons. Ownership of either residential or commercial property qualifies, with exceptions for parking spaces, hotel units, roads and common areas. The property owner qualification does not require any personal presence within the Town, nor residence within the neighboring County nor in the State of Colorado, nor even United States citizenship. Non-resident voters in the Town are not restrained from voting in the governmental elections of their actual residence. As of January 2, 1996, the Town Census disclosed that there were approximately 505 eligible resident voters and approximately 541 non-resident property owners eligible to vote. (App. A, *infra* pp. 4a-7a). At a recent Town election, the non-resident voters exceeded the residential voters.

Several residents of the Town brought this proceeding for a declaratory judgment that the Charter violated their rights to Equal Protection because of the dilution of their vote resulting from the alternative voter qualification of property ownership. Cross-motions for summary judgment were filed, based on facts set forth in a Joint Stipulated Plan and Schedule for Discovery.

On October 18, 1996, the District Court for the District of Colorado (Daniel, J.) granted Defendant's Motion for Summary Judgment and denied Plaintiffs' Motion. The district court determined that the Town's "voting provision does not impinge on a right or liberty protected by the Constitution" (App. B,

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1. The Charter as approved had a 180 day ownership requirement which mirrored the 180 day continuous residence requirement. The 180 day period was changed by a Charter amendment to a 30 day requirement after the institution of this lawsuit.

infra p. 23a) and thus applied the rational basis standard. The district court also held that "Where a law expands the right to vote causing vote dilution, the rational basis test has been applied by the vast majority of courts." (App. B, *infra* p. 23a)

Appeal was taken to the Tenth Circuit. On December 19, 1997, the Court of Appeals affirmed the granting of summary judgment to Defendant. A Petition for Rehearing and a Suggestion for a Rehearing en banc was filed on January 5, 1998, and denied on January 23, 1998.

The Court of Appeals affirmed based on two conclusions: (1) the approval of the Charter provision by a vast majority of the residents afforded Equal Protection; and (2) that voter dilution as a result of adding voters is tested by rational basis rather than strict scrutiny. The court stressed that

> the issue in this case must turn upon the uncontroverted fact that . . . registered voters, again all residents of the Town, approved by an overwhelming majority the Home Rule Charter at issue in this case.

(App. A, *infra* p. 14a). The court also emphasized that the Charter "does not restrict the right to vote — it expands it to include non-residents owning real property . . ." (App. A, *infra* p. 9a). In support of its decision that expansion is to be tested by rational basis rather than strict scrutiny, the court relied on the authority of a 1962 district court decision, *Spahos v. Mayor and Councilmen of Town of Savannah Beach, Tybee Island, Georgia*, 207 F. Supp 688 (S.D. Ga. 1962), *affirmed per curiam*, 371 U.S. 206, 83 S. Ct. 304, 9 L. Ed. 2d 269 (1962); *Glisson v. Mayor and Councilmen of Town of Savannah Beach, Tybee Island, Georgia*, 346 F.2d 135 (5th Cir. 1965), and several lower court and state court decisions applying the rational basis

test to special district elections. Following the rational basis analysis, the court concluded that "the non-resident property owners have a sufficient interest in Town affairs to make it rational for the Town to include them in the political process." (App. A, *infra* p. 15a).

The questions presented here are whether a majority vote approval of a charter provision enfranchising non-residents to vote in general government elections satisfies Equal Protection rights of the thereby diluted residents, and whether expansion of the franchise in governmental elections, in this case by including non-resident property owners, must meet only a rational basis test. The far more narrow issue of whether it is rational to base the franchise on property ownership is not before this Court.

REASONS FOR GRANTING THE WRIT

I.

IMPORTANCE

The Tenth Circuit approved a voting scheme enfranchising non-resident property owners in municipal elections. The decision below is a radical departure from established Supreme Court law that consistently has required strict scrutiny of voter qualifications in general elections. There is nothing in this case that warrants, even suggests, any reason for this Court to abandon the firmly established requirement that there must be a compelling governmental interest in order to permit anyone other than residents meeting the age and citizenship requirement to vote in governmental elections. This is not a case in a grey area. This is not a case involving an election in a special purpose district. The election here is for a municipal government, and is an election like all elections conducted in every city, town,

village or other municipality throughout the United States. In all those elections, residents, and only residents, vote. Thus, the fundamental and unprecedented change in governmental election qualifications approved by the Tenth Circuit is of tremendous national importance.

There are, several aspects of this case that require this Court to reverse the decision below. The decision opens the door to an infiltration of resident electors by outsiders who have any "rational" claim to an interest in the government. Here the claim is that owners of a 50% fee interest in real property within the municipality have such an interest. Renters, owners of businesses, employees, property owners with less in interest than 50% but of more valuable property, and others can legitimately argue under the Court of Appeals decision that they have an equally compelling interest. And any such outsiders with a "rational" connection, like the property owners here, can so dilute the vote of residents that the residents no longer elect their government. The right to elect the government then rests with non-residents of the community. In this case the right is given to those wealthy enough to own property in the Town but who choose to live elsewhere.

The analysis of the Court of Appeals ignored two bedrock principles of Constitutional law as consistently stated by this Court: dilution of the vote is of no lesser consequence that denial of the vote, and approval of a law by the majority is of no Constitutional significance.

Permitting non-resident property owners to vote merely because they "expand" the franchise, undermines a basic tenet of representative government. That tenet requires that only those living within the boundaries of a political entity can elect its government. Expansion as a result of adding other qualifications as an alternative to residence, whether based on property

ownership or other criteria such as residence in the adjoining county, employment by or ownership of a business within the governmental entity, and others not even imagined[2], will fully erode the fundamental notion of government by the people. Control of local government will be shifted from those who reside in the community to those that have an "interest" in the community, in this case property owners. Moreover, validating the determination of who may vote because such determination had majority approval, subjects Constitutionally protected rights to a popular vote, in violation of long standing principles and controlling authority of this Court. Thus, the decision below is erroneous on two fundamental Constitutional issues of great significance.

Absent review by this Court, the Circuit Court decision will serve as a How-To Manual for those seeking to undo consistent decisions of the Court affirming the right of every resident to cast an equally weighted vote for the election of his or her government. Accordingly, the decision below extends well beyond the particular claim by Mountain Village residents that they have been denied Equal Protection. It extends to all elections where residence is, and has always been, an essential voter qualification.

II.

THE DECISION OF THE COURT OF APPEALS IGNORED CONSISTENT DECISIONS OF THIS COURT.

The case is important because of its radical departure from the inviolate principle that residents, and only residents, elect their government. And the departure is a consequence of the

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2. For a listing of some of the vote dilution practices reaching the courts, *see Brown v. Board of Commissioners of the City of Chattanooga, Tennessee*, 722 F. Supp. 380, 383 (E.D. Tenn. 1989).

failure of the Court of Appeals to follow holdings and principles long since settled by this Court as discussed below. This Court has always required that anything that encumbers the right to vote in governmental elections receives strict scrutiny. Similarly, anything that dilutes that right, for example gerrymandering, has similarly been strictly scrutinized and invariably rejected. Yet here, by giving the vote to non-residents whose only qualification is property ownership, the court has approved a scheme no less invasive than schemes consistently disapproved. The expansion here has so diluted the vote of residents that they may not be able to elect their government. Government is selected by absentee landowners. (App. A, *infra* p. 7a). Only in very limited circumstances involving special purpose districts, as defined in *Salyer Land Company v. Tulare Lake Basin Water Storage District*, 410 U.S. 719, 93 S. Ct. 1224, 35 L. Ed. 2d 659 (1973); and *Ball v. James*, 451 U.S. 355, 101 S. Ct. 1811, 68 L. Ed. 2d 150 (1981), has the Court varied from its requirement of strict scrutiny. And there is no contention here that the Town of Mountain Village is a special purpose district, nor could such an argument be made.

To uphold non-resident voting, the Circuit Court had to reject fundamental tenets of our jurisprudence long embedded in decisions of this Court. By its approval of voting by outsiders, through its disregard of fundamental law, the court has opened the door to other rational basis schemes invidious to residents. The decisions of this Court that were rejected or ignored, held that:

(i) Strict scrutiny is applied to all governmental election qualifications. Whether the vote of any one person is diluted by expansion, or any other cause, or denied, is tested by the same standard: strict scrutiny. Application of the rational basis test is an exception applicable only to certain

special district elections. To receive rational basis treatment, the special purpose district may not exercise normal governmental functions and there must be a direct relationship between the qualification and the purpose of the special district. No decision of this Court, nor any other court, supports a conclusion that the Town of Mountain Village is to be treated as a special district.

(ii) The right to vote is a fundamental right not determined by, or subject to, the vote of a majority.

It was not, and cannot be disputed that strict scrutiny of the Charter provision would require a determination that it is unconstitutional. Defendant cannot show a compelling governmental interest in giving the vote to non-resident landowners. *Evans v. Cornman*, 398 U.S. 419, 90 S. Ct. 1752, 26 L. Ed. 2d 370 (1970); *Dunn v. Blumstein*, 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972).

A. Strict scrutiny is applied to all voter qualifications in general governmental elections.

In an unbroken string of cases, this Court has never wavered from the principle that all infringements of the right to vote in general governmental elections are to be tested by strict scrutiny. *See* for example, the apportionment cases, among them: *Wesberry v. Sanders*, 376 U.S. 1, 84 S. Ct. 526 (1964); *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964); *Allen v. State Board of Elections*, 393 U.S. 544, 89 S. Ct. 817, 22 L. Ed. 2d 1 (1969); *Abate v. Mundt*, 403 U.S. 182, 91 S. Ct. 1904 (1971); and *Board of Estimate of City of New York v. Morris,* 489 U.S. 688, 109 S. Ct. 1433 (1989). Strict scrutiny

was applied to the use of additional voter qualifications which infringed upon the right of residents to vote, such as poll-tax qualification (*Harper v. Virginia State Board of Elections*, 383 U.S. 663, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966)), the exclusion of those living in a federal enclave (*Evans v. Cornman*, *supra*), the exclusion of resident servicemen (*Carrington v. Rash*, 380 U.S. 89, 85 S. Ct. 775, 13 L. Ed. 2d 675 (1965)), a requirement of a one year residency (*Dunn v. Blumstein*, *supra*), the exclusion of residents in a school district election who neither had children nor paid real property taxes (*Kramer v. Union Free School District No. 15*, 395 U.S. 621, 89 S. Ct. 1886, 23 L. Ed. 2d 583 (1969)). All of the infringements were struck down. It is thus beyond argument that any tampering, whether by restriction or dilution with a resident's right to cast an undiluted vote to elect his or her government, except for age and citizenship requirements, receives strict scrutiny.

Despite the Supreme Court's consistent protection of the right of all residents to cast an undiluted vote in general governmental elections, the Circuit Court permitted the Town of Mountain Village to favor its property owners over its residents by diluting the vote of the latter. It applied the rational basis test.

The court below referenced only *Reynolds v. Sims*, *supra*, and *Dunn v. Blumstein*, *supra*. Both cases, which applied strict scrutiny, were distinguished. *Reynolds* and *Dunn* were distinguished because the charter in question "expands it [the right to vote] to include non-residents owning real property in the Town." (App. A, *infra* pp. 9a-10a). While neither case faced the precise issue of expansion as a consequence of an alternative to residence, the reasoning in both cases cannot be distinguished or dismissed. Both cases make it absolutely clear that expansion is the same as denial. *Reynolds* struck down two Alabama legislative apportionment schemes which resulted in severe

dilution of the vote of residents of several counties. The *Reynolds* Court left no doubt as to whether expansion resulted in any lesser evil than the evil of denial. The Court wrote:

> And history has seen a continuing expansion of the scope of the right of suffrage in this country. The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise. (p. 555).

In *Reynolds*, the Court went on to condemn the possibility of the election of representatives by economic interests, precisely the voting scheme approved by the Tenth Circuit.

> Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system. (p. 562).

Nor is it possible to disregard *Dunn* and limit it to cases denying the franchise. While *Dunn* did hold only with respect to a one year residency requirement, which it struck down, the Court's reasoning is applicable here. Strict scrutiny was applied to protect the right of newly-arrived residents to cast their vote and thus preserve the political community. As the Court wrote:

> An appropriately defined and uniformly applied requirement of bona fide residence may be necessary to preserve the basic conception of a political community, and therefore could withstand close constitutional scrutiny. (pp. 343-344).

Not until *Salyer Land*, *supra*, did this Court make any exception to the application of strict scrutiny to all elections. *Salyer Land* made an exception only for qualified special district elections. Before *Salyer Land*, strict scrutiny was also the standard for special district elections. Strict scrutiny was applied in *Kramer*, *supra*, a case involving school district elections, in *Cipriano v. City of Houma*, 395 U.S. 701, 89 S. Ct. 1897, 23 L. Ed. 2d 647 (1969), a case involving the vote on the issuance of utility revenue bonds, and in *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 90 S. Ct. 1990, 26 L. Ed. 2d 523 (1970), a case involving the vote for general obligation bonds secured by property taxes. In all three special district cases, limiting the franchise to property owners to the exclusion of residents, was struck down.

Salyer Land, *supra*, created a precisely limited and specific exception to the time-honored residence qualification. To qualify for an exception as a special district, the quasi-government entity had to satisfy two criteria: (i) the district cannot exercise normal governmental functions; and (ii) the economic burden of the district's operations must fall almost exclusively on the land, not the residents. It is the satisfaction of these two tests that the Court used to distinguish *Salyer Land* from *Kramer*, *Cipriano* and *City of Phoenix*. *Salyer Land*'s application of rational basis has itself been carefully limited. *See Hill v. Stone*, 421 U.S. 289, 95 S. Ct. 1637, 44 L. Ed. 2d 172 (1975) where the Court found unconstitutional a voting requirement that restricted the vote to those that had "rendered" property for taxation in a special purpose city bond election. The Court relied on *Kramer*,

Cipriano and *City of Phoenix*, and found that *Salyer Land* had no application because of its application to a very limited special interest situation. (*Hill v. Stone* at p. 295, n.5).

The Town of Mountain Village is not a special district, and indeed did not even seek to become one under the applicable Colorado statute[3]. Nor has the Town argued that it does not perform general governmental functions or that the cost of its operations are imposed almost exclusively on landowners. Accordingly, neither *Salyer Land* nor any of the special district cases relied on by the Tenth Circuit (cases cited in n.8, p. 10a: *Snead*, *Millis* or *Bjornestad*, App. A, *infra* p. 10a[4]) have application.

1. *The authority relied on by the Court of Appeals is either distinguishable as a special district case, or of no persuasive merit.*

The cases primarily relied on by the Tenth Circuit as being "most factually similar to the case before us" (App. A, *infra* p. 10a), were *Spahos*, *supra*, a 1962 case, and *Glisson*, *supra*, a 1965 case. Both cases are vestigial.

Spahos and *Glisson* should be considered together since they arose in the same community, under the same law. *Spahos*

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3. C.R.S. § 32-1-101 *et seq.* provides for special districts. C.R.S. § 32-1-103 fixes voter qualifications in special districts. Under § 32-1-103(5)(a), non-residents may be enfranchised, but they must be Colorado residents.

4. *Snead v. City of Albuquerque*, 663 F. Supp. 1084 (D.N.M. 1987), *aff'd*, 841 F.2d 1131 (10th Cir. 1987), *cert. denied*, 485 U.S. 1009, 108 S. Ct. 1475, 99 L. Ed. 2d 704 (1988); *Millis v. Board of County Commissioners of Larimer County*, 626 P.2d 652 (Colo. 1981); or *Bjornestad v. Hulse*, 281 Cal. Rptr. 548 (Cal. App. 3 Dist. 1991).

was decided by a three judge district court and affirmed *per curiam* by the Supreme Court. A *per curiam* affirmance by the Supreme Court of a district court case has dubious value as a precedent, if any at all. As this Court stated in *Anderson v. Celebrezze*, 460 U.S. 780, 786 n.5, 103 S. Ct. 1564, 1568 n.5, 75 L. Ed. 2d 547 (1983),

> [w]e have often recognized that the precedential effect of a summary affirmance extends no further than the precise issues presented and necessarily decided by those actions.

The precise issue in *Spahos* was whether the federal court would interfere with state legislation. That issue was laid to rest in *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962), decided in the same year. *Baker* effectively overruled the holding in *Spahos* by permitting federal court review of state voting provisions. *Spahos* has remained deep in shadow ever since *Baker v. Carr*.

Glisson, *supra*, was decided in 1965 by the Fifth Circuit in a very short opinion relying only on *Spahos* and *McGowan v. Maryland*, 366 U.S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961). In both *Spahos* and *Glisson* the non-resident voting was limited to county residents, and county residents were included pursuant to a state statute specifically permitting the enfranchising of such county residents.[5] But more importantly, both *Spahos* and *Glisson* were decided before the great wave

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5. The existence of a Georgia statute specifically authorizing non-resident voting and its limitation to surrounding county residents create distinctions with this case. For one, the geography in *Spahos* insured that the non-resident voters did not get two municipal votes. Another distinction is the limitation in Georgia to surrounding county residents. In the case at bar there is no limitation whatsoever. Citizenship is not even required.

of voter rights litigation, and both cases relied on subsequently discredited authority. They do not reflect the law as it is after thirty years of vigorous voting rights litigation. In *Spahos* and *Glisson,* the Court deferred to the state legislature under the authority of *McGowan, supra. McGowan* was decided in 1961 and upheld a Maryland statute commonly referred to as a "Sunday Closing Law" against an equal protection claim that the law was discriminatory and created improper classifications among businesses. It was not a voting rights case. *McGowan*, after making a brief appearance in *Spahos* and *Glisson*, was put to rest as authority for voting rights cases by *Kramer, supra*, where this Court stated:

> Accordingly, when we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a "rational basis" for the distinctions made [footnote citing *McGowan*] are not applicable. (pp. 627-628).

Thus the holdings of *Spahos* and *Glisson* that state action providing for certain non-resident voting is to be judged under the rational basis test of *McGowan* has been undercut by the subsequent rejection of *McGowan* as authority in voting rights cases. It is not surprising then that *Spahos* and *Glisson* have been rarely cited as authority, and only discussed in the case at bar. Neither case is authority for the radical departure from strict scrutiny taken by the Court of Appeals.

B. Expansion is dilution, and dilution is tested by the same standard as denial.

From *Baker v. Carr*, *supra*, through *Board of Estimate of City of New York v. Morris*, *supra*, and to this date, this Court

has never wavered from the proposition that diluting the vote is no more permissible than foreclosing it. Indeed, all of the apportionment cases are dilution cases, simply because the wrong resulting from improper apportionment is vote weight augmentation in one quarter and vote weight dilution in the other. Every apportionment decision of this Court, whether it concerned apportionment for federal, state, county or city elections, applied strict scrutiny.

Therefore, the Circuit Court's statement that because the Charter provision expanded the franchise it need only meet the rational basis test (App. A, *infra* pp. 9a-10a) is contrary to the law. Whether strict scrutiny or rational basis applies to voter qualifications does not hinge on whether the qualification opens the polls to an additional class of voters[6], or keeps otherwise qualified voters out. It depends only on whether the election is for a general government or a special district. *See Ball v. James*, supra.[7] A review of thirty-some years of voting rights litigation

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6. The statement that expansion is a "lesser constitutional evil" has been applied only to special district cases; not general government elections. *See Sutton v. Escambia County Board of Education*, 809 F.2d 770, 775 (11th Cir. 1987), *rehearing denied*, 817 F.2d 761 (1987), a school board election case where city residents were allowed to vote in county school board elections. *See also Duncan v. Coffee County, Tennessee*, 69 F.3d 88 (6th Cir. 1995).

7. Colorado decisional law makes the same hard line distinction between general governmental elections and special district elections. *See Chesser v. Buchanan*, 568 P.2d 39, 193 Colo. 471 (Colo. 1977) and *Millis v. Board of County Commissioners of Larimer County*, *supra*, where, in both cases the Colorado Supreme Court upheld a voter classification based on property ownership because the election was in a special purpose district which did not have general governmental powers and the classification was directly related to the purpose of the district. *See also City of Aurora v. Aurora Sanitation District*, 149 P.2d 662 (Colo. 1944).

confirms that all voter qualifications for general elections, other than residence, age and residence, receive strict scrutiny. *See Gray v. Sanders*, 372 U.S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963), which struck down a Georgia "county unit system" giving heavier weight to rural voters than to urban voters. The Court's decision is based on the premise that the vote rests with the residents within a constituency, and each resident must have an equal vote. The Court stated:

> Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote — whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. (p. 379).
>
> * * *
>
> The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing — one person, one vote. (p. 381).

By affording special treatment for expansion, as was done by the Court of Appeals, the gates are open to voting schemes which add voters of a certain class — here landowners, but it could be anyone with an interest — with the objective of diluting residents. Impairment of certain votes can be just as effectively achieved by expansion as the use of poll taxes and literacy tests. All that will be required is that expanding the electorate is rational.

The gatekeeper will be the courts. Because it is they who will have to make the determination as to whether the dilution

itself is reasonable. And that decision will determine the relative strength of every resident's vote or even whether the residents can elect their own government. This is certainly not what the Declaration of Independence, the Constitution, Lincoln in the Gettysburg address, or the Court in *Gray*, *id.*, meant a popular election to be.

It is therefore submitted that the question of whether there is an exception to strict scrutiny in governmental elections for an expansion of the franchise, in this case by adding non-resident property owners, was erroneously decided by the Court of Appeals.

C. Approval by a majority of the voters cannot be a basis for denial of a constitutional right.

The Tenth Circuit emphasized in its decision that the issue in the case

> must turn on the uncontroverted fact that . . . registered voters, all residents of the Town, approved by an overwhelming majority the Home Rule Charter at issue in this case.

(App. A, *infra* p. 14a). The Circuit Court, to even consider, much less adopt, a decision by a voter majority as pivotal, ignored all the decisions of this Court upholding fundamental Constitutional rights against the will of the majority.

The most directly controlling authority is *Lucas v. Forty-Fourth General Assembly of State of Colorado*, 377 U.S. 713, 84 S. Ct. 1459, 12 L. Ed. 2d 632 (1964). *Lucas* dealt with a legislative apportionment plan that was submitted to the voters at a popular referendum to amend the Colorado Constitution. It was approved by the voters. Not only did the *Lucas* Court

reject the reapportionment of the State Senate because it did not result in an equally weighted vote for each resident, but it soundly rejected the notion that approval by the electorate had any Constitutional significance. The prohibition against permitting the majority to deny a Constitutional right is not unique to *Lucas*; it runs through apportionment cases and appears in many other cases as well. The prohibition was expressly stated in *Avery v. Midland County, Texas*, 390 U.S. 474, 88 S. Ct. 1114, 20 L. Ed. 2d 45 (1968). The Court wrote:

> The majority of a State — by constitutional provision, by referendum, or through accurately apportioned representatives — can no more place a minority in oversize districts without depriving that minority of equal protection of the laws than they can deprive the minority of the ballot altogether, or impose upon them a tax rate in excess of that to be paid by equally situated members of the majority. Government — National, State, and local — must grant to each citizen the equal protection of its laws, which includes an equal opportunity to influence the election of lawmakers, no matter how large the majority wishing to deprive other citizens of equal treatment or how small the minority who object to their mistreatment. (FN 6, p. 481).

The Tenth Circuit even failed to follow its own similar determination in *Gillette v. McNichols*, 517 F.2d 888 (10th Cir. 1975).

Moreover, there can be no question that the right of a resident to cast an undiluted vote, once granted to anyone in a political unit, is a fundamental right. *See Wesberry v. Sanders, supra*: ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under

which, as good citizens, we must live." (p. 535)); *Lucas v. Forty-Fourth General Assembly of State of Colorado, supra*; *Reynolds v. Sims, supra*; *Avery v. Midland County, Texas, supra*; *Kramer v. Union Free School District No. 15, supra*; and *Dunn v. Blumstein, supra.*

That the resident voters of the Town of Mountain Village approved a Charter that diluted their own vote is of absolutely no moment to the minority who have a constitutional right to a vote undiluted by the addition of non-residents. The holding to the contrary by the Tenth Circuit is of tremendous importance. The decision invites majority intervention into voter qualifications thereby further eroding the basic notion that the residents, and only the residents, elect the government of the political unit in which they live.

III.

CONFLICT WITH OTHER CIRCUITS

Review is not being sought because of any direct conflict with the decision of another Circuit. No direct conflict exists simply because only one other Circuit, the Fifth in *Glisson* discussed above, has considered non-resident property-based voting in general elections. However, there are cases in the Second, Third, Sixth and Seventh Circuits stating that dilution by non-residents was unconstitutional. Permitting the Tenth Circuit decision enfranchising non-residents to stand can only serve to create confusion in the lower courts which, in turn, will lead to very different results in dealing with the fundamental right to vote.

In *Clark v. Town of Greenburgh*, 436 F.2d 770 (2d Cir. 1971), the Second Circuit upheld the denial by a district court judge of a motion to empanel a three judge district court. The

Second Circuit found no constitutional issue because all the voters in overlapping local electorates resided in the electorate. The court noted that it was not being asked to pass on non-resident voting and stated:

> Thus, plaintiffs have argued the case as though the residents of Buffalo were being allowed to vote in the elections of the Town of Greenburgh [Ed: communities on opposite sides of the state]. We need not decide what consequences or remedies would flow from that egregious improbability. The only voters in the Town elections live there. (p. 772).

The Third Circuit in *Deibler v. City of Rehoboth Beach*, 790 F.2d 328 (3d Cir. 1986), a ballot access case, invalidated a taxpaying qualification on the right to run for public office. The Court did, however, acknowledge, as *dicta*, that non-resident voting by freeholders may unconstitutionally dilute the vote of residents under *Baker* and *Lucas* (p. 331).

In *Duncan v. Coffee County, Tennessee*, 69 F.3d 88 (6th Cir. 1995), the Sixth Circuit permitted an expansion of the electorate in a county school district case because it only added residents of a city which had a substantial interest in the county school system. The Sixth Circuit made it clear that the expansion was only permissible because it was within the non-suspect qualification of residence. Had the expansion included non-residents, the Sixth Circuit strongly indicated it would not have permitted it.

Finally, in *Cantwell v. Hudnut*, 566 F.2d 30 (7th Cir. 1977), *cert. denied*, 439 U.S. 1114 (1979), the Seventh Circuit upheld the governance of special police and fire districts by officials elected in county elections where the boundaries of the election districts and the special purpose districts did not exactly

coincide. The Court distinguished the special districts before it from general governmental elections where it could not have condoned voting by extra-territorial residents or, as it called them, "strangers".

Accordingly, four Circuits have made it manifest that they would not permit non-resident voting in general government elections. Only the Tenth Circuit has upheld such non-resident voting as a general proposition. The Fifth Circuit upheld non-resident voting on far narrower facts and well before modern voting rights decisions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED DECEMBER 19, 1997

Joan MAY, William Felicelli, John Rielly, Peter Chadman, Virginia Oglesby, and David Holubetz, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants,

v.

TOWN OF MOUNTAIN VILLAGE, Darrell Huschke, Mayor et al., Defendants-Appellees,

No. 96-1504

* * *

Before BALDOCK, BRORBY, Circuit Judges, and BROWN, Senior District Judge.*

WESLEY E. BROWN, Senior District Judge.

In this civil rights case the plaintiffs, all residents of the Town of Mountain Village, Colorado, initiated a class action against the Town and its governing officers to contest provisions of the Town Charter which allow nonresident landowners to vote in municipal elections. Upon cross motions for summary judgment, the District Court found that the provision allowing nonresidents to vote was not irrational or arbitrary, and thus did not violate plaintiff residents' constitutional right to equal protection under the law. Summary judgment was granted in

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* Honorable Wesley E. Brown, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

favor of defendants on all federal law claims, and this appeal follows. *May v. Town of Mountain Village*, 944 F.Supp. 821 (D.Colo. 1996)

Jurisdiction of the Court of Appeals rests on 28 U.S.C. §1291 as an appeal from a final judgment of the District Court granting the defendants' motion for summary judgment, and dismissing plaintiff's complaint.

For the reasons set out below, we affirm that judgment.

The Issues

In the District Court, plaintiffs based their claim of the unconstitutionality of the Charter upon five arguments — that is i) that the Equal Protection Clause bars nonresident landowner voting; ii) that basing town council districts partly on the number of nonresident landowners violates equal protection; iii) that voting by nonresident landowners violates Colorado law; iv) that Colorado law requires residency as a condition for participation in municipal charter elections; and v) that nonresident landowner voting and charter provisions on initiative and referendums violates Colorado's constitutional right of initiative and referendum. The District Court ruled only upon the first issue, finding that questions involving districting and various amendments to the Charter were moot or not ripe for judgment. The Court also declined to exercise supplemental jurisdiction over state law claims and those issues are not before us.[1]

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1. At the time of the court's decision the Town was awaiting the results of an election to be held to determine whether districts would be redrawn, or whether districting should be abolished entirely (Cont'd)

Appendix A

The only question presented in this appeal is whether the home rule charter of the Town of Mountain View, which permits nonresident real property owners to vote in municipal elections, violates the 14th Amendment to the federal constitution by diluting the vote of the residents of that Town.

The Facts

The pertinent undisputed facts in this case, as presented to the District Court, are as follows: (Joint Stipulated Plan and Schedule for Discovery, Pp. 87, 90-94, Appellants' Appendix).

The Town of Mountain Village is located in San Miguel County in the San Juan Range of the Rocky Mountains in southwest Colorado. As of July 1993, San Miguel County had approximately 4,300 permanent residents. The Town, which consists of about 2,049 acres of land, is situated in the mountains above and on the opposite side of a ski mountain from the Town of Telluride, Colorado. As of July, 1993, the Town of Telluride had a permanent population of approximately 1,360.

In 1984, the Telluride Company began development of the area that was later incorporated as the Town under a development plan first approved by San Miguel County in 1981. The center of the Town is located at the base of the Telluride Ski Area and contains the terminal of the main gondola, which reaches the Town from Telluride. The Town also contains single family and duplex residential units, residential condominium

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(Cont'd)
in favor of at-large voting. In addition it appeared that the amendment of the Charter relating to reduction of residence requirements from 180 days to 30 day had become moot, since plaintiffs did not challenge the 30 day requirement.

units, hotel rooms, commercial space and facilities for recreational activities such as golf, tennis, swimming and other outdoor activities. As of January 2, 1996, the Town had approximately 505 residents who were qualified to vote. Including persons under 18 years, the Town had approximately 568 residents.

Before the Town was incorporated, it was a part of unincorporated San Miguel County. At an election on January 17, 1995, the Town received voter approval to incorporate under Colorado law. There were 268 registered voters entitled to vote in this election, all of whom were residents of the Town. Forty-one persons voted in this election, 40 voting for the incorporation, and one against.

On March 7, 1995, a Town election was held on whether to approve a proposed home rule charter for the Town (hereafter, the "Charter"). Only registered voters who were residents of the Town were entitled to vote in this election. Fifty-three residents voted; 40 voted to approve the Charter, 13 voted against doing so.

On March 10, 1995, the Colorado District Court for San Miguel County issued an order declaring that the Town had been validly incorporated, and that it had adopted a Home Rule Charter under the provisions of Article XX of the Colorado Constitution.[2]

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2. Article XX § 6(d) of the state Constitution gives the full right of self-government in both local and municipal matters to municipalities, and to home rule towns, the power to "legislate upon, provide, regulate, conduct and control . . . [a]ll matters pertaining to municipal elections in such . . . town. . . ."

Appendix A

Section 2.4(a) of the Charter granted the right to vote to all residents of the Town, so long as they had been legal residents for at least 180 consecutive days immediately prior to the election, and were at least 18 years old on the date of the election.[3]

Section 2.4(b) of the Charter granted the right to vote to owners of real property located within the Town, who are not legal residents of the Town, so long as they: a) have been owners of record for at least 180 consecutive days immediately prior to the date of the election; (b) during that 180 days owned a minimum of 50% of the fee title interest in certain real property; (c) are at least 18 years old on the date of the election; and (d) are natural persons. Ownership of both residential and commercial real property entitles the owner to vote, but ownership of parking spaces, hotel units, roads or common areas does not qualify voters. Section 2.4(d) of the Charter further provides that there may only be one vote cast per person, regardless of whether or not he or she may be a qualified Legal Resident and/or own one or more parcels of qualified real property. (Appellees' Supp. Appendix at p. 38)

Section 1.4(b) of the Charter sets out the reasons for extending the vote to nonresidents:

> (b) Provision for Non-resident Voting Rights. Certain non-resident property owners have been extended voting rights concerning municipal and local affairs based upon the following reasons:

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3. Pursuant to a later resolution and a special election held on April 4, 1996, the residence requirement was reduced to 30 days. This reduction was passed by a vote of 126 to 55.

Appendix A

1. Like many resorts, the nature of the economy and the life-style of the people of the Town are, and will in the future remain, unusual. Furthermore, the fact that many of the Town's present and future residential and commercial property owners maintain their primary residences outside of the Town, making them part-time second-home non-residents, is also unusual. Although these facts are not substantially different from most resort towns, they are very unusual for conventional small as well as large towns.

2. The framers of this Charter took cognizance of the above-mentioned singular state of affairs, most especially the fact that a large number of the property owners of the Town are, and will continue to be, only part-time residents of their Town by granting to them the right to vote on those issues that are strictly limited in nature to Town matters. (Appellees' Sup. Appendix p. 35).

Pursuant to the Charter, an election for members of the town council was held on March 28, 1995. "There were thought to be" 268 resident voters eligible to vote at that time, and 39 voted. The Town mailed 490 ballots to nonresident property owners qualified to vote pursuant to section 2.4(b) of the Charter, of whom 105 voted. The Town did not mail ballots to resident voters.[4]

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4. It should be noted that the election held in March, 1995, when "there was thought to be 268 resident voters", was conducted at a time when a residency of 180 days was required.

At a meeting on January 9, 1996, the Town Council adopted a resolution stating that it would enact an ordinance amending the Charter in order to reduce the residence requirement to 30 days. A special election was subsequently conducted on April 4, 1996, at which time Section 2.4(a)(1) was amended to reduce the residency requirement to 30 days.

Appendix A

As of January 2, 1996, a Town census disclosed that in addition to approximately 505 eligible resident voters in the Town, there were approximately 541 nonresident property owners eligible to vote pursuant to the Charter.

Nonresidents entitled to vote currently own over 34% of the assessed value of real property in the Town, while residents own only about 5% About 61% of the assessed value of real property in the Town is owned by nonresident corporations and trusts, which are not entitled to vote in Town elections. Nonresidents pay over eight times more in property taxes than the residents do, and it is fair to state that in the future such nonresident property owners will continue to contribute significant revenues to the Town. (Appellees Supp. App. at pp. 2)[5]

Under its Charter, the Town has the right to establish land use standards, community services, municipal ordinances. to

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5. For the tax year 1995 the total assessed value of real property in the Town was approximately $89,352,529 and the total real estate taxes levied against that property in 1995 was $6,419,356. The assessed value of real property owned by residents of the town was approximately $3,896,918, with real property taxes levied against residents in the sum of $279,955. From that tax sum, the Town received approximately $8,336 as part of the Town's law enforcement assessment.

The assessed value of real property owned by nonresident property owners entitled to vote under section 2.4(b) of the Charter was approximately $30,912,699, and the taxes levied on that property were $2,221,038. Of those taxes received from non-residents entitled to vote, the Town received approximately $63,909 as part of the Town's law enforcement assessment. (Affidavit of Linda Check, Ex. 2, Appellees' Supplemental Appendix)

adopt capital improvement programs, establish property and other taxes, borrow money, issue bonds, create special improvement districts, to control public utilities and to condemn property. (Supplemental Appendix at pp. 42-43, §3.6, and pp. 62-65, §11.1.) By granting nonresident property owners the right to vote on issues limited to Town matters, the Charter gives those nonresidents a voice in the affairs of the Town, including taxes to be paid and how tax dollars will be spent.

Discussion

We review summary judgment decisions *de novo*, *Trierweiler v. Croxton and Trench Holding Corp.*, 90 F.3d 1523, 1537 (10th Cir. 1996). We conclude that the District Court properly found that the constitutionality of the nonresident voting provisions of the Town Charter should be evaluated using the rational basis test.[6]

The guarantee of equal protection under our federal constitution was described by the Supreme Court in *Harris v. McRae*, 448 U.S. 297, 322, 100 S.Ct. 2671, 2691, 65 L.Ed.2d 784, at 808, (1980):

It is well settled that where a statutory classification does not itself impinge on a right or liberty protected by the Constitution, the validity of classification must be sustained unless "the classification rests on grounds wholly irrelevant to

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6. In the briefs on appeal, plaintiffs dispute defendants' contention that in oral argument below, plaintiffs conceded that strict scrutiny of the voting provisions did not apply. Since we find that the great weight of authority supports application of the "rational basis" test, the question of plaintiffs' concession on this point is not materiai to our decision.

the achievement of [any legitimate governmental] objective." McGowan v Maryland, 366 U.S., at 425 [81 S.Ct. at 1105] . . . This presumption of constitutional validity, however, disappears if a statutory classification is predicated on criteria that are, in a constitutional sense, "suspect". the principal example of which is a classification based on race, e.g., Brown v. Board of Education, 347 US 483, 74 S.Ct. 686, 98 L.Ed. 873. . . .

In *Harris* the Supreme Court noted that while the guarantee of equal protection is not a source of substantive rights, an exception to that statement is to be found in *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). *Simms* held that if a State adopts an electoral system, the Equal Protection Clause of the Fourteenth Amendment confers upon a voter a substantive right to participate in the electoral process equally with other qualified voters. See f.n. 25, *Harris v. McRae*, 448 U.S. at 322, 100 S.Ct. at 2691, 65 L.Ed.2d at p. 808, *and see Dunn v. Blumstein*, 405 U.S. 330, 336, 92 S.Ct. 995, 999-1000, 31 L.Ed.2d 274, 280 (1972).[7]

Of critical importance to any decision here is the fact that Section 2.4(b) of the Town Charter does not restrict the right to vote — it expands it to include nonresidents owning real property in the Town. As pointed out by the District Court, "[w]here a law expands the right to vote causing voting dilution,

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7. The *Reynolds* decision involved the reapportionment of the Alabama legislature, and the unconstitutional dilution of the weight of votes depending upon the residence of the voters.

In *Dunn* a Tennessee resident successfully challenged state constitutional and statutory provisions which barred him from voting because he had not been a resident of the state for one year or a resident of the county for three months' time prior to the election.

the rational basis test has been applied by the vast majority of courts." *May v. Town of Mountain Village*, *supra*, 944 F.Supp. at p. 824.[8] Among such cases and most factually similar to the case before us are *Spahos v. Mayor & Councilmen of Savannah Beach, Tybee Island, Ga.*, 207 F.Supp. 688 (S.D. Ga), *aff'd per curiam*, 371 U.S. 206, 83 S.Ct. 304, 9 L.Ed.2d 269 (1962), and *Glisson v. Mayor and Councilmen of Town of Savannah Beach*, 346 F.2d 135 (1965). Under the facts of these two cases it appears that Savannah Beach was a resort town in Chatham County, Georgia, with a population of 1,385 persons, which

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8. Among the cases are those in the 5th and 11th Circuits dealing with Alabama law which permitted residents of cities with independent school systems to vote in county school board elections. *See Sutton v. Escambia County Bd. of Educ.*, 809 F.2d 770 (11th Cir. 1987); *Davis v. Linville* 864 F.2d 127 (11th Cir. 1989); *Creel v. Freeman*, 531 F.2d 286 (5th Cir. 1976), *cert. den.* 429 U.S. 1066, 97 S.Ct. 797, 50 L.Ed.2d 784 (1977) The "rational basis" test was applied which depended in part upon whether the city residents had a substantial interest in the operation of the county school system. In many cases in which the requisite interest was found nonresident taxes or other economic contributions gave significant support to the county or rural school systems.

In a similar school district case from the 6th Circuit, the proper standard of review to apply when the franchise was expanded was discussed in *Duncan v. Coffee County Tenn.*, 69 F.3d 88, at p. 94 (6th Cir. 1995), which held that "[m]erely expanding the voter roles is, standing alone, insufficient to make out a claim of unconstitutional vote dilution." In *Collins v. Town of Goshen*, 635 F.2d 954, (2d Cir. 1980) Arcadia Hills, part of the Town of Goshen had its own water district whose officials were elected by all the residents of the Town, not just the residents of Arcadia Hills. This scheme was found to be rational because the Town had often advanced town taxes to keep the water district going.

was increased by an additional 2,500 persons during the summer. Under state law, non-residents of the town, who resided in the county, who owned real property in Savannah Beach were permitted to vote in Savannah Beach elections. In finding that this election scheme did not violate the equal protection clause of the 14th Amendment, the courts considered that the assessed value of property in the town was $4,414,295, of which $2,852,040 was returned by nonresidents, and that as of December, 1961, there were 549 persons registered to vote as permanent residents, and 443 were registered as non-residents, owning property in the town. A substantial majority of the nonresidents resided in Savannah Beach for periods of one to four months during the summer.

In *Snead v. City of Albuquerque*, 663 F.Supp. 1084 (D.N.M. 1987) *Affd* 841 F.2d 1131, *cert. den.* 485 U.S. 1009, 108 S.Ct. 1475, 99 L.Ed.2d 704, residents of Bernalillo County, New Mexico, all but one of whom owned property in the City of Albuquerque, contested a municipal bond election. Local law provided the right to vote on creation of municipal debts to any person who owned property within the city limits who had paid a property tax during the preceding year, although there was no requirement of property ownership by residents of the City. The court held that the voter classification rationally limited the extension of the vote to those who were directly affected by the outcome of the election. It was particularly noted that one who resides outside of a governmental unit has no fundamental right to vote, but a municipality can permit such persons to do so if there is a rational basis to find they are affected by the issue put to the vote. 663 F.Supp. at 1088.

A similar finding was made by the Colorado Supreme Court in *Millis v. Bd. of Cty. Com'rs of Larimer Cty.*, 626 P. 2d

652 (Colo. 1981) where nonresidents of Colorado who owned vacation property in the High Drive Water District near Estes Park, Colorado were excluded from voting on water district matters. It should be noted that at that time a Colorado statute expressly excluded out of state property owners from voting on water district matters, although Colorado residents, who did not live within the water district were allowed to vote on district matters. In this case, it appeared that the water district consisted of about 120 to 130 residences or parcels eligible for water service, but only 9 of these were owned by full time residents, the majority being owned by out of state residents. The water district was organized in 1974 by a vote of 27 to 21, and the district proposed to issue bonds for $350,000 to finance a water system. The qualified voters in the district passed this proposal. The out of state plaintiffs in the case were not allowed to vote. The Colorado court held that the voting scheme did not violate the state constitution since giving the vote to Colorado landowners and not to out of state landowners was a reasonable and rational choice since state residents could be presumed to have a special interest in urban development and its effect on the state's environment that residents of other states might not have.[9] In arriving at this decision, the Colorado court reviewed the law pertaining to the franchise in the state of Colorado in this manner: (626 P.2d at pp. 657-658)

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9. In the *Millis* case the out of state property owners also filed a separate suit on the issue in the Colorado federal district court, raising federal constitutional claims. The federal court found that a rational basis for excluding out of state owners existed and dismissed the case; *Millis v. High Drive Water District*, 626 P.2d 652 (D.C. Colo. Jan. 18, 1978), *affirmed without opinion, Mills v. High Drive Water District*, 439 U.S. 802, 99 S.Ct., 58 L.Ed.2d 95 (1978). In ruling on the state issues, the Colorado Supreme Court followed the federal court's reasoning. *See* 626 P.2d at p. 658.

Appendix A

With respect to restrictions on the franchise, classifications based upon residency, citizenship, or age have never been considered suspect . . . (citations omitted). Nonresidents do not have a fundamental right to vote in elections in this state. *Jarmel v. Putnam*, 179 Colo. 215, 499 P.2d 603 (1972). Indeed we have held that our legislature has the power to determine "the qualifications of voters in all public and quasi-municipal corporations and all reasonable provisions with reference thereto will be upheld." *People ex rel Shaklee v. Milan*, 89 Colo. 556, 560, 5 P.2d 249, 251 (1931). The fact that a nonresident owns land in this state does not create a fundamental right to political participation in decisions which affect that land. While nonresident landowners may be enfranchised, see *People ex rel Cheyenne Soil Erosion District v. Parker,* 118 Colo. 13, 192 P.2d 417 (1948),[10] there is nothing in our constitution that requires they be given voting rights in a political subdivision where they do not live. (footnotes omitted, emphasis supplied).

In the case before us, the uncontroverted evidence discussed above supports the District Court's conclusion that:

Plaintiffs have failed to show that the Defendants' reason for allowing nonresident landowners to vote in the Town. . . is either irrational or arbitrary. I find credible Defendants' contentions that the Town . . . is a unique resort community where nonresident landowners own the majority of property and pay more than eight times the amount of property tax. Defendants further assert that without the significant revenues the nonresident landowners have contributed to the Town, the

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10. The *Parker* case arose under the Colorado Soil Conservation Act amendment which extended voting rights to nonresidents, corporations and others owning land in soil erosion districts.

Town might never have come into existence. Moreover, the nonresidents continue to bear the weight of the financial burden for the Town. Defendants argue that providing the nonresident landowners the right to vote gives them a voice in the Town's future, including the taxes they will have to pay and how those taxes should be spent . . . These factors demonstrate that the Town had a rational basis for enacting the Charter provision granting nonresident landowners the right to vote. (944 F.Supp. at 825)

Summary

Simply stated, the issue in this case must turn upon the uncontroverted fact that the Town of Mountain Village was incorporated pursuant to the overwhelming vote of registered voters, all of whom were residents of the Town. Following that incorporation, registered voters, again all residents of the Town, approved by an overwhelming majority the Home Rule Charter at issue in this case. Under Article XX of the Colorado constitution Home Rule Towns have the power to "legislate upon, provide, regulate, conduct and control . . . *all* matters pertaining to municipal elections" (emphasis supplied). Section 1.4(b) of the Charter specifically sets out the reasons for extending the vote to nonresidents of the Town, in particular recognizing the special nature of the resort community. There is no evidence in this case of any suspect classification of voters and equal weight is to be given to the votes of residents and nonresidents. With nonresident voting power limited to those owning at least 50% of the fee title to real property, there is no possibility of "loading up" the nonresident vote through excessive partitions of a piece of property, as was the case in *Brown v. Board of Com'rs of Chattanooga, Tenn.*, 722 F.Supp.

380 (E.D.Tenn. 1989) where as many as 23 nonresidents were registered to vote on a single piece of property.[11]

In this case it is clear that the nonresident property owners have a sufficient interest in Town affairs to make it rational for the Town to include them in the political process. Currently they pay approximately eight times more real property taxes in property taxes, and under the Charter, the Town has the power to establish land use standards, enact ordinances, adopt capital improvement programs, set tax rates, borrow money, issue bonds, create special improvement districts, control utilities, and to condemn property. Each of these powers has great potential to affect property owners in significant respects. *See Bjornestad v. Hulse (Sierra Lakes Water Dist.)* 229 Cal.App.3d 1568, 281 Cal.Rptr. 548, where the court concluded that the rational basis test must be applied to an Equal Protection vote dilution claim based upon the enfranchisement of nonresident landowners in a special district election.[12]

---

11. The *Brown* case involved the improper dilution of the black vote in Chattanooga by voting provisions which extended the franchise to nonresidents who owned trivial amounts of real property in the city. In the 1988 election there were 547 nonresidents who had registered to vote, 427 of whom were white persons. The court found that a provision which gave a vote to a nonresident who owned a 1/15th interest in a lot assessed at $100 did not further any rational government interest, and so the voting scheme violated the equal protection clause of the 14th Amendment.

12. In *Bjornestad*, even nonresident commercial entities owning property in the water district were given the vote by proxy. The court noted that the particular nature of the Sierra Water District was of persuasive importance. At the time, it was primarily a second-home, vacation community with a relative low number of permanent residents. The district was in an area of "tremendous snowfall", and its financial burdens were borne largely by its landowners.

In light of the foregoing factors, it is clear that the district court correctly concluded that the nonresident property owners in the Town of Mountain Village have a substantial interest in township elections, and under such circumstance, the order of the district court granting summary judgment to defendants is AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO DATED OCTOBER 18, 1996

Joan MAY, William Felicelli, John Rielly, Peter Chadman, Virginia Oglesby and David Holubetz, on behalf of themselves and all others similarly situated, Plaintiffs,

v.

TOWN OF MOUNTAIN VILLAGE, a Colorado Municipal Corporation; Darrell Huschke, Mayor and Council Member, Town of Mountain Village, in his official and individual capacities; Julie Cram, David Disick, David C. Flatt, Steve Hilbert, Doug Tueller and Linda Rodgers, Town Council members, in their official and individual capacities, Defendants.

Civil Action Nos. 96-D-126, 96-D-139.

United States District Court,
D. Colorado.

Oct. 18, 1996

* * *

DANIEL, District Judge.

I. INTRODUCTION

This civil rights class action is before the Court in connection with Plaintiffs' motion for partial summary judgment filed on July 1, 1996 and Defendants' cross motion for partial

summary judgment filed July 22, 1996.[1] The Plaintiffs challenge certain voter qualification and districting provisions of the Home Rule Charter ("Charter") of the Town of Mountain Village ("the Town"), State of Colorado. The Town is a European styled master planned community situated in the mountains above Telluride. Plaintiffs seek declaratory, injunctive and other equitable relief and damages on behalf of themselves and all other similarly situated Town residents. The Town seeks a declaratory judgment upholding the constitutionality of the Town's Charter.[2]

The core issues presented appear to be of first impression in this Circuit and include: (1) whether the Town can legally extend the right to vote in its municipal elections to people located throughout the United States and possibly abroad who own property in the Town but who do not reside in the Town; and (2) if so, whether a districting plan based upon the inclusion of such voters is valid. In short, the Plaintiffs allege that the town's voters' qualification and districting scheme as a whole unconstitutionally reduces the power of Town residents' vote and gives disproportionate voting power to nonresident land owners.[3] Plaintiffs allege that this scheme is designed to

---

1. The Plaintiffs and Defendants I refer to herein are the Plaintiffs and Defendants in civil action number 96-D-126. However, I also note for the record that the Town of Mountain Village is the Plaintiff and Joan May is the Defendant in civil action number 96-D-139. These two actions are consolidated.

2. The Charter was approved by the residents in a March 7, 1995 election in which nonresidents were not allowed to vote.

3. The provision of the Charter that extends the franchise to nonresident landowners provides that they must meet the following

(Cont'd)

concentrate control of the Town in the hands of real estate interests so that development will be easier and cheaper and the Town can spend less of its resources on the needs of the Town's residents, including affordable housing and open space.[4]

Plaintiffs base their claim of unconstitutionality of the Town's Charter on five arguments, and they are the ones that I have been asked to resolve with respect to the pending motion for partial summary judgment. They are: (i) whether the Equal Protection Clause bars nonresident landowner voting; (ii) whether basing town council districts partly on the number of nonresident landowners violates equal protection; (iii) whether voting by nonresident landowners violates Colorado law; (iv) whether Colorado law requires residency as a condition for participation in municipal charter elections; and (v) whether nonresident landowner voting and charter provisions on initiative and referendum violate Colorado's constitutional right of initiative and referendum. Defendants' motion for partial summary judgment seeks a declaration that the Town Charter is constitutional.

(Cont'd)

requirements: (a) they have been owners of record for at least 30 consecutive days immediately prior to the election; (b) during that 30 days they owned a minimum of 50% of the fee title interest in certain real property; (c) they are at least 18 years old on the date of the election; and (d) they are natural persons. Charter, § 2.4(b)

4. Based on the Scheduling Order in this case, there are currently 505 eligible resident voters and 541 nonresident property owners empowered to vote.

Appendix B

II. ANALYSIS

A. Federal Law Claims

1. Whether Allowing NonResident Landowners the Right to Vote in Municipal Elections Violates the Equal Protection Clause of the Fourteenth Amendment

a. The Parties' Argument

Plaintiffs argue that voting is a fundamental political right, and that it is the citizens or residents of the state who have this right. Plaintiffs rely on the Supreme Court's holding that "an appropriately defined and uniformly applied requirement of residence may be necessary to preserve the basic conception of a political community." Dunn v. Blumstein, 405 U.S. 330, 344, 92 S.Ct. 995, 1004, 31 L.Ed.2d 274 (1972). Further, Plaintiffs argue that no court has extended the "one man, one vote" principle to individuals residing beyond the geographic confines of the governmental entity concerned; instead, the cases have uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those within its borders. See Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 68-69, 99 S.Ct. 383, 385, 58 L.Ed.2d 292 (1978).

Plaintiffs originally asserted in their motion that the appropriate constitutional test to be applied to the Charter provisions at issue was strict scrutiny, arguing that the Town has shown and can show no compelling interest in allowing nonresident landowners to vote which justifies dilution of their fundamental right to vote. Plaintiffs relied on the apportionment cases where strict scrutiny was applied, Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), arguing that

vote dilution can occur not only where districts are improperly apportioned, but also in situations such as this case where persons who are not part of the local population are admitted to the franchise.

In their response to Defendants' cross motion for partial summary judgment and at the hearing held on this matter on September 18, 1996, Plaintiffs modified their position. Plaintiffs now suggest that an intermediate standard of review should be applied, although they acknowledge that there is no authority for applying such a standard in a voting case. Finally, Plaintiffs argue that even under a rational relationship test, nonresident voting is not constitutional. Specifically, Plaintiffs assert that there is no rational basis for allowing persons to vote in general municipal elections whose only connection to a town is ownership of property. Plaintiffs argue that nonresident landowners might be institutionally interested in bond and real property tax issues but do not have a cognizable interest in the general governance of the town.

Plaintiffs, in their briefs, distinguish a number of cases where nonresidents were allowed to vote, asserting that these cases involved "special-purpose" elections, such as bond elections, which have narrow and special purposes that disproportionately impact a group such as nonresidents. Alternatively, Plaintiffs argue that the electoral schemes in those cases were different since they were sanctioned by the legislature, the nonresidents were living in an adjoining county that had a strong connection or joint interest with the town, and/or the nonresidents constituted a minority of the voters.

Defendants assert that it enacted the provisions of its Charter pursuant to the broad grant of power from the Colorado

Appendix B

Constitution which gave the full right of self-government in both local and municipal matters to municipalities, Colo. Const. Art. XX, and to home rule towns the power to "legislate upon, provide, regulate, conduct and control . . . all matters pertaining to municipal elections in such . . . town." Colo. Const. Art. XX § 6. Defendants assert that because § 2.4(b) of the Charter does not infringe on fundamental rights and does not discriminate against any suspect class, it is presumptively valid and subject only to a rational basis review. Defendants further contend that Plaintiffs have failed to meet their burden of showing that section 2.4(b) of the Charter violates the Equal Protection Clause because they have not shown that it is not rationally related to a legitimate state interest.

Defendants argue that the Town is a unique resort community and that its Charter was approved only by residents of the Town. In the Charter, the residents chose to extend the franchise to nonresident property owners. According to Defendants, the Charter has a rational basis since it was adopted to ensure that the special nature of the resort community was safeguarded, that the beauty of the Town's natural surroundings would be preserved, that the recreational nature of the Town must be encouraged and that both residents and nonresidents have a significant interest in fulfilling these objectives. Also, future nonresidents will contribute much revenue to the Town, and currently own more than 34% of the assessed value of real property in the Town compared to about 4% for Town residents. In fact, nonresidents pay nearly eight times more in property taxes than residents. The Charter assures these nonresidents of having a vote in the future of the Town, including tax revenue related issues.

b. Analysis

[1] The Equal Protection Clause of the Fourteenth Amendment clearly applies to all action of the state or its subdivisions, including local government action such as in the case at hand. Avery v. Midland County, Texas, 390 U.S. 474, 479-80, 88 S.Ct. 1114, 1117-18, 20 L.Ed.2d 45 (1968). The first decision I must make in assessing the constitutionality of the Town's enactment under the Equal Protection Clause is to determine the proper standard of review. Since I find that the Town's voting provision does not impinge on a right or liberty protected by the Constitution, I agree with Defendants that the rational basis standard is appropriate rather than the strict scrutiny test. Here, Plaintiffs do not allege that section 2.4(b) creates any classification whatsoever, that it discriminates against a suspect class, that it treats similarly situated persons differently, or even that the votes of residents and nonresidents are weighted differentially.

Moreover, after a careful review of the record in this case, there is simply no evidence that the Town restricts access to the electoral process or treats voters unequally. In this case, section 2.4(b) of the Charter expands the right to vote and equally weighs the votes of all allowed to vote. Where a law expands the right to vote causing voting dilution, the rational basis test has been applied by the vast majority of courts. See Clark v. Town of Greenburgh, 436 F.2d 770, 771-72 (2nd Cir. 1995); Creel v. Freeman, 531 F.2d 286, 288 (5th Cir. 1971); Duncan v. Coffee County, Tenn., 69 F.3d 88, 94 (6th Cir. 1995); Cantwell v. Hudaut, 566 F.2d 30, 37-38 and n. 15 (7th Cir. 1977); cert. denied, 439 U.S. 1114, 99 S.Ct. 1015, 59 L.Ed.2d 71 (1979); Spahos v. Mayor & Councilmen of Savannah Beach, 207 F.Supp. 688, (S.D.Ga.), aff'd per curiam, 371 U.S. 206,

83 S.Ct. 304, 9 L.Ed.2d 269 (1962); Snead v. City of Albuquerque, 663 F.Supp. 1084, 1085-88 (D.N.M), aff'd, 841 F.2d 1131 (10th Cir. 1987); cert. denied, 485 U.S. 1009, 108 S.Ct. 1475, 99 L.Ed.2d 704 (1988); Bjornestad v. Hulse (Sierra Lakes Water Dist.), 229 Cal.App.3d 1568, 281 Cal.Rptr. 548, 562-64 (1991).

[2][3] Under the rationale basis test, the Charter's voting provision must be sustained "unless the classification rests on grounds wholly irrelevant to the achievement of [any legitimate governmental interest]." Harris v. McRae, 448 U.S. 297, 322, 100 S.Ct. 2671, 2691, 65 L. Ed.2d 784 (1980) (quoting McGowan v. Maryland, 366 U.S. 420, 425, 81 S.Ct. 1101, 1104- 05, 6 L.Ed.2d 393 (1961)). In other words, to overcome the presumption of validity of the government action, the person challenging the law must demonstrate that it is arbitrary or irrational. Parham v. Hughes, 441 U.S. 347, 351, 99 S.Ct. 1742, 1745-46, 60 L.Ed.2d 269 (1979); Borden's Farm Products Co. v. Baldwin, 293 U.S. 194, 209, 55 S.Ct. 187, 191, 79 L.Ed. 281 (1934).

Plaintiffs have failed to show that the Defendants' reason for allowing nonresident landowners to vote in the Town of Mountain Village is either irrational or arbitrary. I find credible Defendants' contentions that the Town of Mountain Village is a unique resort community where nonresident landowners own the majority of property and pay more than eight times the amount of property tax. Defendants further assert that without the significant revenues the nonresident landowners have contributed to the Town, the Town might never have come into existence. Moreover, the nonresidents continue to bear the weight of the financial burden for the Town. Defendants argue that providing the nonresident landowners the right to vote gives

them a voice in the Town's future, including the taxes they will have to pay and how those taxes should be spent. However, the charter ensures that the special nature of the resort community will be safeguarded. These factors demonstrate that the Town had a rational basis for enacting the Charter provision granting nonresident landowners the right to vote.

The Southern District of Georgia's opinion in Spahos is similar to this case. Residents therein objected to state statutes which gave the right to vote in municipal elections to nonresident real property owners of the municipality of Savannah Beach who resided in the county where the town was located. Savannah Beach was a resort town with a large summer population of nonresidents. Over half of the property tax valuation in the town was paid by nonresidents. The Court, applying a rational basis review, rejected the residents' claims that nonresident property owners' voting diluted their votes. The court held that it was rational to "permit those persons owning property within the municipality, many of whom were summer residents therein, to have a voice in the management of its affairs." Id. at 692; see also Glisson v. Mayor and Councilmen of Savannah Beach, 346 F.2d 135, 136-37 (5th Cir. 1971); Duncan, 69 F.3d at 96-98; Snead, 663 F.Supp. at 1087-89; Bjornestad, 281 Cal.Rptr. at 562-65.

Accordingly, since I find that the Charter provision allowing nonresident landowners to vote in municipal elections satisfies the requirements of the rational basic standard, summary judgment in Defendants' favor is GRANTED as to this issue.

2. Whether the Charter Provision which Apportions Districts Based on Qualified Voters, including Nonresident Landowner Voters, Violates the Equal Protection Clause of the Fourteenth Amendment

Until amended in the election of April 4, 1996, § 3. l(a)-(c) of the Charter established the town council districts based on the "potential density" of the Town at build-out. As amended, the Charter bases the districts on qualified voters, including nonresident landowners eligible to vote. On November 5, 1996, the Town asserts that it will submit a proposal of Joan May's to the voters to abandon districting altogether and allow at-large voting.

Plaintiffs argue that the districting provisions of both the original Charter and the Charter, as amended, resulted or will result in grossly unequal populations, under-representing the residents of the town who live in rental housing concentrated in two of the seven districts. Plaintiffs further argue that the Charter violates the Federal Constitution which requires that districts be based on equal populations and violates the principle of one person-one vote. See Reynolds, 377 U.S. at 579, 84 S.Ct. at 1390-91; Avery, 390 U.S. at 484-85, 88 S.Ct. at 1120-21.

[4] Defendants assert that the arguments regarding sections 3. l(a)–(c) of the Charter and the voting districts established therein are either moot or not yet ripe. First, Defendants assert that any request for relief which would require the Town to redraw the original districts has been mooted by the April 4, 1996 election which requires the Town to reform the original districts before the next Town council election. I agree that Plaintiffs' claim that the original Charter violated equal protection

is moot. See Shimabuku v. Britton, 503 F.2d 38 (10th Cir.1974) (where new regulations had been written which satisfied constitutional requirements, so that plaintiffs had already received everything they sought and could be granted, their due process claim was effectively mooted); Bradley v. Judges of the Superior Court, 531 F.2d 413, 417 (9th Cir.1976) (equal protection challenge to law was dismissed as moot when amendments to law removed any claimed constitutional infirmity).

[5] Second, Defendants assert that any challenge to the amended Charter which requires that new districts be redrawn based upon qualified voters is not ripe or may become moot. Specifically, the districts have not and may not be redrawn depending on the results of the November 5, 1996 election wherein the voters will determine whether districting should be abolished in favor of at- large voting. I agree with Defendants that this issue is not yet ripe for review by this Court. "Allegations of possible future injury do not satisfy the requirements of Article III. A threatened injury must be 'certainly impending' to constitute injury in fact." Whitmore v. Arkansas, 495 U.S. 149, 158, 110 S.Ct. 1717, 1725, 109 L.Ed.2d 135 (1990); see also Nat'l Conference of Catholic Bishops v. Smith, 653 F.2d 535 (D.C.Cir.1981) ("The mere existence of a statute does not create a 'case or controversy,' particularly when, as here, the position of the government itself is far from definite and certain as to what the statute requires with the consequence that action is either unlikely or, at least, not imminent.") Moreover, if the voters abolish districting in the November election, this issue will become moot.

[6] Accordingly, since I find that the apportionment claim is either not yet ripe or else is moot, summary judgment in Defendants' favor is GRANTED as to this issue.[5]

B. State Law Claims

[7] Plaintiffs assert the following pendent state law claims: (i) whether the durational residency requirements and voting rights of nonresident land owners violate the Colorado Statutes; (ii) whether allowing nonresident landowners to vote in charter elections violates the Colorado Constitution and Statutes; and (iii) whether nonresident landowner voting and Charter provisions on initiative and referendum violate Colorado's constitutional right of initiative and referendum. I decline to exercise supplemental jurisdiction over these claims pursuant to 28 U.S.C. § 1367(c)(1) and (3). These claims involve novel issues of State law, and I have granted summary judgment as to all claims over which I have original jurisdiction. Accordingly, the state law claims are DISMISSED WITHOUT PREJUDICE.

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5. Plaintiffs' Amended Complaint asserts a further federal claim that the durational residency requirement of the charter, § 2.4(a)(1), violates the Equal Protection Clause. Specifically, until amended in the April 4, 1996 election, the charter provided that to qualify to vote, a resident of the Town must be a resident for 180 continuous days. Plaintiffs asserts that this law disenfranchised citizens who had recently moved to the Town, burdened their right to migrate and deprived them of the fundamental right to vote. It is not clear whether Plaintiffs still seek relief under this claim. Nonetheless, I find that this issue is moot given the fact that the charter was amended to allow residents of 30 days to vote, the constitutionality of which Plaintiffs do not challenge. See Shimabuku, 503 F.2d at 44; Bradley, 531 F.2d at 417.

Appendix B

IV. CONCLUSION

For the reasons stated above, it is ORDERED that summary judgment in favor of the Defendants is GRANTED as to the entirety of Plaintiffs' federal law claims based on equal protection. It is FURTHER ORDERED that Plaintiffs' state law claims are DISMISSED without prejudice as this Court declines to exercise supplemental jurisdiction over them pursuant to 28 U.S.C. § 1367(c)(1) and (3).

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED JANUARY 23, 1998

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 96-1504

JOAN MAY, WILLIAM FELICELLI, JOHN RIELLY, PETER CHADMAN, VIRGINIA OGLESBY, and DAVID HOLUBETZ, on behalf of themselves and all others similarly situated,

Plaintiffs - Appellants,

v.

TOWN OF MOUNTAIN VILLAGE, a Colorado Municipal Corporation; DARRELL HUSCHKE, Mayor and Council Member, Town of Mountain Village, in his official and individual capacity; JULIE CRAM, DAVID DISICK, DAVID C. FLATT, STEVE HILBERT, DOUG TUELLER, and LINDA RODGERS, Town Council members, in their official and individual capacities,

Defendants - Appellees.

ORDER

Filed January 23, 1998

Before **BALDOCK** and **BRORBY,** Circuit Judges, **BROWN*,** District Judge.

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* Honorable Wesley E. Brown, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

Appendix C

Appellants' petition for rehearing is denied by the panel that rendered the decision.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: s/ illegible
Deputy Clerk

Supreme Court, U.S.
FILED
MAY 20 1998
CLERK

No. 97-1738

In The

Supreme Court of the United States

October Term, 1997

JOAN MAY, WILLIAM FELICELLI, JOHN RIELLY, PETER CHADMAN, VIRGINIA OGLESBY and DAVID HOLUBETZ,

Petitioners,

vs.

TOWN OF MOUNTAIN VILLAGE, a Colorado Municipal Corporation, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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QUESTION PRESENTED

Does the Equal Protection Clause of the Fourteenth Amendment require strict scrutiny for claims of vote dilution based upon state laws that expand the right to vote in general municipal elections?

PARTIES TO THE PROCEEDING

The petition fails to identify properly the parties to the proceeding. In addition to the Town, which *is* named as a respondent, Petitioners sued individual Town Council members in their official and personal capacities, and, pursuant to 42 U.S.C. § 1983, Petitioners sought both compensatory and punitive damages. The individuals sued below were Darrell Huschke, Julie Cram, David Disick, David C. Flatt, Steve Hilbert, Doug Tueller, and Linda Rodgers. Although the individual Respondents were appellees in the Tenth Circuit, Petitioners fail to identify them in the petition.

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APPENDIX

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Appendix 2 — Excerpts of Transcript of Proceedings Dated September 18, 1996 ..... 5a

Respondents, the Town of Mountain Village ("Town") and Darrell Huschke, Julie Cram, David Disick, David C. Flatt, Steve Hilbert, Doug Tueller, and Linda Rodgers, hereby respond to the Petition for Writ of Certiorari filed by Joan May, William Felicelli, John Rielly, Peter Chadman, Virginia Oglesby, and David Holubetz ("Petitioners").

CONSTITUTIONAL PROVISION INVOLVED BUT NOT SET FORTH IN PETITION

Article XX, § 6 of the Constitution of the State of Colorado provides in pertinent part:[1]

> The people of each city or town of this state . . . are hereby vested with, and they shall always have, power to make . . . the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.
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> . . . .
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> . . . [S]uch city or town, and the citizens thereof, shall have . . . all other powers necessary, requisite or proper for the government and administration of its local and municipal matters, including power to legislate upon, provide, regulate, conduct and control:
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> . . . .
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> d. All matters pertaining to municipal elections in such city or town . . . including the registration of voters. . . .

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1. The full text of Article XX, § 6 is set forth in the attached Appendix 1.

I. STATEMENT OF THE CASE

Section 2.4(b) of the Town's Home Rule Charter ("Charter") extends the right to vote in the Town's local elections to owners of real property located within the Town but who are not legal residents of the Town so long as they: (a) have been owners of record for at least 30 consecutive days immediately prior to the date of the election; (b) during that 30 days owned a minimum of 50% of the fee title interest in certain real property; (c) are at least 18 years old on the date of the election; and (d) are natural persons. (App. A at 5a).[2]

A. The Town Is Unique.

The Town is located approximately 325 miles southwest of Denver in the San Juan Mountains in San Miguel County, Colorado. *Id.* at 3a. As of July 1993, all of San Miguel County had only about 4,300 permanent residents. *Id.* The Town consists of approximately 2,049 acres of land located on the side of a ski mountain adjacent to the Town of Telluride, Colorado. *Id.*

The Town lies in a picturesque box canyon at the end of a winding two-lane road. Only about 2,000 people live permanently in the valley, and it is very expensive to do so. People are not forced by circumstance to live in the area; they move there for its beauty, and for the skiing and other recreational opportunities it offers. Most of the homes in the Town are second homes, and "without the significant revenues the nonresident landowners have contributed to the Town, the Town might never have come into existence." *Id.* at 13a-14a.

The Town was developed solely in connection with the recreational opportunities created by the Telluride Ski Area. The

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2. References to "App. A or B" are to the Appendices attached to the petition.

center of the Town is located at the base of the ski area, and contains the main gondola terminal which connects the Town with Telluride, a golf course facility, single-family residential units, duplex residential units, residential condominium units, hotel rooms, commercial space for offices, restaurants, shops and services, tennis courts, a swimming pool, cross-country skiing trails, nature preserves, jogging trails, and bicycle and hiking paths. *Id.* at 3a-4a. The Charter was adopted to ensure that the special nature of the resort community would be safeguarded, that the beauty of the Town's natural surroundings would be preserved, and to encourage the recreational nature of the Town. *Id.* at 6a.

The nature of the economy and the life-style of the people of the Town are, and will in the future remain, atypical. For example, the economy of the Town is based primarily upon the resort industry and tourism. The Charter recognizes that another respect in which the Town is unusual is that many of its present and future residential property owners maintain and will continue to maintain their primary residences elsewhere. *See id.*

The Town received voter approval to incorporate under Colorado law at an election held on January 17, 1995. *Id.* at 4a. On March 7, 1995, an election was held on whether to approve the proposed Charter. Only residents of the Town who were registered to vote in San Miguel County were entitled to vote in the Charter election. The Charter was approved by 75% of the residents who voted. *Id.*[3]

The Town has approximately 568 permanent residents, of whom approximately 505 are old enough to vote. *See* App. A

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3. On March 10, 1995, the District Court in and for San Miguel County issued an Order declaring that the Town had been validly incorporated and that the Town had adopted a Home Rule Charter under the provisions of Article XX of the Colorado Constitution. App. 1 at 4a.

at 7a. In addition to the 505 potential resident voters, there are approximately 541 nonresident property owners qualified to vote pursuant to section 2.4(b) of the Charter. *Id.* Nonresidents entitled to vote under section 2.4(b) currently own over 34% of the assessed value of real property in the Town, whereas residents own only about 4%.[4] *Id.* Nonresident property owners pay over eight times more in property taxes than the residents do. *Id.* It is anticipated that in the future nonresident property owners will continue to contribute significant revenues to the Town in the form of fees, licenses, sales taxes, ad valorem property taxes, and special assessments. *Id.* The Charter grants the Town the right to establish land use standards, community services, enact municipal ordinances, adopt capital improvement programs, establish property and other taxes, borrow money, issue bonds, create special improvement districts, control public utilities and establish rates therefor, and to condemn property. *Id.* at 7a-8a. The Town clearly has the power to significantly affect the nonresident landowners. The Charter took cognizance of this singular state of affairs by granting to nonresident property owners the right to vote on issues "strictly limited in nature to Town matters."[5] *See id.* at 8a. The Charter gives nonresident landowners "a voice in the affairs of the Town, including taxes to be paid and how tax dollars will be spent." *Id.*

B. Home Rule Towns in Colorado Expressly Have Been Granted Plenary Power Over Local Elections.

As this Court has recognized, in order to address the myriad complexities facing local government, states are granted

4. About 61% of the assessed value of real property located in the Town is owned by nonresident corporations and trusts which are not entitled to vote. App. A. at 7a.

5. This limitation precludes nonresident voters from voting twice on any state or national issues.

extraordinarily wide latitude in creating various types of political subdivisions and conferring authority on them. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978). States characteristically provide for representative government at the local level, and not infrequently do so by delegating power to local units of government by "constitutional provisions for local home rule which are immune from legislative interference." *Avery v. Midland County, Tex.*, 390 U.S. 474, 481 (1968).

Colorado long ago recognized the wisdom of delegating power to local government: in 1912, Colorado enacted Article XX of the Colorado Constitution. The intent of Article XX is "to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters." COLO. CONST. art. XX, § 6. The act specifically delegates to home rule towns the power to "legislate upon, provide, regulate, conduct and control . . . all matters pertaining to municipal elections in such . . . town." COLO. CONST. art. XX, § 6(d). Section 2.4(b) was enacted pursuant to this grant of authority.

C. Petitioners Are an Ill-Defined Minority Seeking To Overturn the Vote of the Town's Residents.

When 75% of the Town's residents voted to enfranchise the nonresident landowners, they were exercising the power granted to them by Article XX, § 6 of the Colorado Constitution. Petitioners seek to override the political decision made by the Town's residents.

Petitioners' various filings below raise an obvious question: just who is seeking to vitiate the popular vote of the electorate? Petitioners filed the case originally as a class action on behalf of *all* residents of the Town. Yet, of the *residents* who voted, 75% voted to approve the Charter. The truth is that this case is

being prosecuted on behalf of an ill-defined and unrepresentative minority who have resorted to the judicial process to accomplish what they were unwilling or unable to do politically.

> In the absence of invidious discrimination, however, a court is not free under the aegis of the Equal Protection Clause to substitute its judgment for the will of the people of a State as expressed in the laws passed by their popularly elected legislatures.

Parham v. Hughes, 441 U.S. 347, 351 (1979); *see also People ex rel. Tate v. Prevost*, 134 P. 129, 133 (Colo. 1913) (certain issues best left "to be fought out on the hustings and determined by the people at the polls.").

II. REASONS FOR DENYING THE WRIT

A. There Is No Conflict Among the Circuits: Lower Courts Uniformly Have Applied Rational Basis Review to Claims of Vote Dilution Based upon Expanding the Right To Vote.

1. Decisions from the Second, Fifth, and Sixth Circuits Have Applied Rational Basis Review to State Laws that Allow Nonresident Landowners To Vote in General Municipal Elections.

The sole issue properly raised by the petition is whether the Equal Protection Clause of the Fourteenth Amendment requires that strict scrutiny invariably be applied to vote dilution claims based upon state laws that expand the right to vote in general municipal elections.[6] The Tenth Circuit properly held

6. Although the petition lists four "Questions Presented," the first and third issues are the same. The second issue — whether constitutional rights (Cont'd)

that it did not. Using rational basis review, the Tenth Circuit held section 2.4(b) constitutional because there was a rational basis to allow nonresident landowners to vote in Town elections.[7]

Petitioners concede, as they must, that there is no conflict among the circuits. The Tenth Circuit's decision is consistent with decisions from the Fifth Circuit, one of which has been affirmed by this Court. *See Glisson v. Mayor & Councilmen of Savannah Beach, Tybee Island*, 346 F.2d 135, 137 (5th Cir. 1965); *Spahos v. Mayor & Councilmen of Savannah Beach, Tybee Island, Ga.*, 207 F. Supp. 688 (S.D. Ga.), *aff'd per curiam*, 371 U.S. 206 (1962). Both decisions are indistinguishable from the present case.[8]

(Cont'd)
can be deprived by majority vote — relates to dictum in the Tenth Circuit's opinion, was not raised or argued below, and is not properly before this Court. *See, e.g., Capps v. Humble Oil & Refining Co.*, 536 F.2d 80, 82 (5th Cir. 1976) (cannot raise new theory on appeal that was not presented below). As to the fourth issue — whether section 2.4(b) is unconstitutional because the Town did not also enfranchise nonresidents who do not own land in the Town but nevertheless might be interested in participating in its elections — it too was not raised below. In addition, because Petitioners here are all residents, they lack standing to raise this argument. *See Petition* at 2 ("*residents* of the Town brought this proceeding. . . ."); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976) (injury in fact necessary to confer standing).

7. Petitioners do not challenge the Tenth Circuit's conclusion that the Town had a rational basis to enfranchise nonresident landowners.

8. *See also Angel v. City of Fairfield, Tex.*, 793 F.2d 737, 740 (5th Cir. 1986) (votes of residents not unconstitutionally diluted by allowing nonresidents to vote in general municipal elections because "[w]hen nonresidents were allowed to vote . . . all of the qualified voters were treated alike, and their respective votes were diluted to the same extent.").

Petitioners are wrong in asserting that only the Fifth Circuit has addressed the present issue. *See Petition* at 19. Although the issue rarely arises, it has been addressed by two Second Circuit cases, both of which applied rational basis review to challenges to state laws that allowed nonresidents to vote in general municipal elections. *See Collins v. Town of Goshen*, 635 F.2d 954, 959 (2d Cir. 1980) (Friendly, J.); *Clark v. Town of Greenburgh*, 436 F.2d 770, 772 (2d Cir. 1971).

The issue was also addressed in a district court case from the Sixth Circuit. *See Brown v. Board of Comm'rs of Chattanooga, Tenn.*, 722 F. Supp. 380 (E.D. Tenn. 1989). After carefully analyzing the relevant federal cases, the court in *Brown* applied rational basis review to a vote dilution claim based upon a provision in the city charter which allowed nonresidents to vote in general municipal elections. *Id.* at 398.[9] Every reported case that has addressed a vote dilution claim based upon a law which granted nonresident landowners the right to vote in general municipal elections has applied rational basis review.

2. Decisions from the Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits Have Applied Rational Basis Review to State Laws that Allow Nonresidents To Vote in Special District and School Board Elections.

As the Tenth Circuit reasoned:

> Of critical importance to any decision here is the fact that Section 2.4(b) of the Town Charter does not restrict the right to vote — it expands it to include nonresidents owning real property in the Town. As

9. Two Florida cases also held constitutional statutes that allowed nonresident property owners to vote in general municipal elections. *See Andrews v. Linden*, 284 So. 2d 398 (Fla. Ct. App. 1973); *Hisgen v. Rileigh*, 115 So. 2d 715 (Fla. Ct. App. 1959).

> pointed out by the District Court, "[w]here a law expands the right to vote causing vote dilution, the rational basis test has been applied by the vast majority of courts."

App. A at 9a-10a. As discussed above, every court that has addressed a vote dilution challenge to a law allowing nonresident landowners to vote in general municipal elections has applied rational basis review. In addition, the Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits have all applied rational basis review to vote dilution claims based upon nonresident voting in special district and school board elections. *See Creel v. Freeman*, 531 F.2d 286 (5th Cir. 1976) (school board), *cert. denied*, 429 U.S. 1066 (1977); *Duncan v. Coffee County, Tenn.*, 69 F.3d 88 (6th Cir. 1995) (school board); *Cantwell v. Hudnut*, 566 F.2d 30, 37 (7th Cir. 1977) (special district), *cert. denied*, 439 U.S. 1114 (1979); *Snead v. City of Albuquerque*, 663 F. Supp. 1084 (D.N.M.) (special district), *aff'd*, 841 F.2d 1131 (10th Cir. 1987), *cert. denied*, 485 U.S. 1009 (1988); *Davis v. Linville*, 864 F.2d 127 (11th Cir. 1989) (Superintendent of Education).[10]

A cogent analysis of the proper standard of review to apply to vote dilution claims based upon expanding the franchise is set forth in *Duncan*, 69 F.3d 88. There, the Sixth Circuit

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10. *See also Bjornestad v. Hulse (Sierra Lakes Water Dist.)*, 281 Cal. Rptr. 548 (Cal. App. 1991) (special district). Although not cited in the petition, *Locklear v. North Carolina State Board of Elections*, 514 F.2d 1152 (4th Cir. 1975), stands alone among all the federal cases in applying the compelling interest test to an Equal Protection claim of vote dilution in a school board election. *Locklear* has been discredited by *Duncan*, 69 F.3d at 94, where the Sixth Circuit found that *Locklear*'s compelling interest standard "would be unworkable," and was based "largely on the misuse of the term vote dilution." *Id. Phillips v. Beasley*, 78 F.R.D. 207 (N.D. Ala. 1978), *rev'd*, 634 F.2d 947 (5th Cir. 1981), also disapproved of, and declined to follow, *Locklear*.

observed that "[m]erely expanding the voter roles is, standing alone, insufficient to make out a claim of vote dilution." *Id.* at 94. A contrary holding would be likely to result in unconstitutional vote dilution every time the franchise is expanded. For example, in 1870, the Fifteenth Amendment extended the right to vote to all persons regardless of "race, color, or previous condition of servitude." This necessarily diluted the voting power of white males. In 1920, the Nineteenth Amendment extended the franchise to women, thereby diluting the votes of all males. And, in 1971, the Twenty-Sixth Amendment extended the franchise to persons eighteen years of age or older, thereby diluting the votes of all persons twenty-one or older. If dilution alone were sufficient to sustain an Equal Protection claim, white males twenty-one and older might be the only persons entitled to vote in the United States. Of course, this would be absurd. As explained in *Duncan*:

> Naturally, any time voters are added to the rolls . . . those already on the rolls have had their votes diluted. Therefore, "vote dilution" is properly understood to be a constitutional term of art. As such, mere expansion of the class of persons eligible to vote does not, *per se*, imply unconstitutional vote dilution.

Duncan, 69 F.3d at 94 n.3. It is only when there is not a rational reason to extend the franchise that unconstitutional vote dilution occurs. *Id.* at 94.

Duncan elucidates the policy which requires that rational basis review be applied to laws that *expand* the franchise:

> We conclude that the systematic use of the compelling state interest test in cases such as this would be unworkable, and is not constitutionally required. . . . Merely expanding the voter roles is, standing alone,

> insufficient to make out a claim of vote dilution. The reason for this conclusion can best be illustrated by an example. If a political entity elects to alter its voting requirements, for example by lowering the voting age, it will expand the voting rolls. This dilutes the votes of those already registered to vote. But it does not do so unconstitutionally, even though the state does not have a compelling state interest in lowering the voting age. Similarly, if a state cut its durational residence requirement in half, it would expand the rolls, but there would still not be an unconstitutional dilution of votes even though the state did not have a compelling state interest in altering the old residence requirement.
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> To hold otherwise would . . . make any expansion of the voting rolls subject to attack because the state did not have a compelling state interest warranting the change. This would leave the scope of the franchise static and virtually unchangeable.

Duncan, 69 F.3d at 94-95.

There are strong reasons to apply only rational basis review to state laws that expand the franchise. As recognized by the court in *Bjornestad*, "[i]n the rational basis cases, the election laws expand rather than restrict the franchise. . . . [A] strict scrutiny approach may hamper the creation of innovative local government units." 281 Cal. Rptr. at 562. Applying strict scrutiny would also impede local governments from expanding the voting rolls to include more people in the political process, and would unnecessarily limit the extraordinarily wide latitude granted to local government. *See Holt*, 439 U.S. at 71.

B. The Tenth Circuit's Decision Is Correct, and Is Not Contrary to any Relevant Decisions of this Court.

Petitioners contend that the Tenth Circuit ignored "consistent decisions of this Court" that establish an "inviolate principle that residents, and only residents, elect their government." Petition at 6. Petitioners argue that "an unbroken string of cases" required the lower court to apply strict scrutiny. *Id.* at 8. Petitioners are wrong on both counts.

First, there is no authority — and Petitioners cite none — which grants residents the exclusive right to elect local government officials. *See, e.g., Bobo v. Mayor of Savannah Beach, Tybee Island*, 114 S.E. 2d 374, 376 (Ga.), *cert. denied*, 364 U.S. 409 (1960).

Second, although the Court indicated in *Burdick v. Takushi*, 504 U.S. 428 (1992), that voting is of "fundamental significance under our constitutional structure," it nevertheless held that not every voting regulation is subject to strict scrutiny.[11] *Id.* at 433. Petitioners here, like the petitioner in *Burdick*, "proceed[ ] from the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny. Our cases do not so hold." *Id.* at 432; *see also Bullock v. Carter*, 405 U.S. 134, 143 (1972) ("not every limitation or incidental

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11. *See also Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982) (the "Court has often noted that the Constitution 'does not confer the right of suffrage upon any one,' and that 'the right to vote, *per se*, is not a constitutionally protected right.' "; quoting *Minor v. Happersett*, 21 Wall 162 (1875), and *San Antonio Independent School Dist. v. Rodriquez*, 411 U.S. 1, 35 (1973)); *Greenwood v. Singel*, 823 F. Supp. 1207, 1212 (E.D. Pa. 1993) (rejecting argument that strict scrutiny applies to all statutes concerning the electoral process); *Snead*, 663 F. Supp. at 1087 ("Simply because the issue involved voting classifications [is] insufficient to" require strict scrutiny).

burden on the exercise of voting rights is subject to a stringent standard of review."); *McDonald v. Board of Election Comm'rs of Chicago*, 394 U.S. 802, 806-09 (1969).

Petitioners rely on two lines of cases in an attempt to evade the virtually unanimous authority that has applied rational basis review to vote dilution claims challenging state laws that expand the right to vote. The first line consists of cases in which residents have been precluded from voting. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330 (1972), *Phoenix v. Kolodziejski*, 399 U.S. 204 (1970); *Evans v. Corman*, 398 U.S. 419 (1970); *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Kramer v. Union Free School District*, 395 U.S. 621 (1969); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966). The second line consists of apportionment cases in which the votes of residents have been weighted differentially. *See, e.g., Board of Estimate of City of New York v. Morris*, 489 U.S. 688 (1989); *Abate v. Mundt*, 403 U.S. 182 (1971); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

The strict scrutiny applied to classifications which *exclude* otherwise qualified residents from voting has been rejected repeatedly where, as here, the challenged law *expands* the franchise. *E.g., Duncan*, 69 F.3d 88; *Collins*, 635 F.2d at 957-58; *Brown*, 722 F. Supp. at 398; *Snead*, 663 F. Supp. at 1087; *Spahos*, 207 F. Supp. at 692; *Bjornestad*, 281 Cal. Rptr. at 562.

The apportionment cases are similarly inapposite. As the Seventh Circuit held in *Cantwell*, *Reynolds* and the other apportionment cases do not apply when the alleged evil is the expansion of the franchise and not differential weighting. 566 F.2d at 37.

> *Reynolds v. Sims* and its progeny were concerned with equalizing deviations from the equal population

> principle in voting districts. These cases do not say that an economic interest, such as property ownership, is an impermissible criterion for apportioning voting power in municipal elections.

Brown, 722 F. Supp. at 398 ("*Over* inclusiveness is a lesser constitutional evil than *under* inclusiveness."); *Bjornestad*, 281 Cal. Rptr. at 562-63. Petitioners do not challenge the Tenth Circuit's finding that "[t]here is no evidence in this case of any suspect classification of voters and equal weight is to be given to the votes of residents and nonresidents." App. A at 14a. Accordingly, the Tenth Circuit's application of rational basis review is consistent with all relevant decisions of this Court, and with the overwhelming weight of authority.

Finally, relying on *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973), and *Ball v. James*, 451 U.S. 355 (1981), Petitioners contend that the Tenth Circuit erred in applying rational basis review because all laws affecting voting in general as opposed to special district elections must be scrutinized strictly.[12] *Petition* at 8-9. Both *Salyer* and *Ball* involved challenges to state laws that limited voting in special district elections to landowners (whether or not they resided within the district). Petitioners in both cases were *residents* who were *denied the right to vote* because they did not own real property. In both cases, the Court applied rational basis review and upheld the exclusion of residents from voting. On the other hand, the Court has held that strict scrutiny is appropriate for laws that excluded residents and allowed only property owners to vote in school district elections, *Kramer*, 395 U.S. 621, elections to approve the issuance of revenue bonds to finance

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12. Petitioners' argument that strict scrutiny must apply to any law relating in any way to voting in general elections is refuted by *Burdick*, 504 U.S. 428, *Rodriguez*, 457 U.S. 1, *Greenwood*, 823 F. Supp. 1207, and *Snead*, 663 F. Supp. 1084.

local improvements, *Cipriano*, 395 U.S. 701, and elections to approve the issuance of general obligation bonds, *Kolodziejski*, 399 U.S. 204.[13]

These cases are easily harmonized: laws that *exclude residents* from voting in general municipal elections are reviewed using strict scrutiny; laws that *exclude residents* from voting in special districts are reviewed using the rational basis test. These cases do not address the standard of review to apply to vote dilution claims based upon *expanding* the franchise to allow nonresident property owners to vote in general municipal elections. The cases which *have* addressed this issue uniformly apply rational basis review. *E.g.*, *Angel*, 793 F.2d 737; *Collins*, 635 F.2d 954; *Clark*, 436 F.2d 770; *Glisson*, 346 F.2d 135; *Brown*, 722 F. Supp. 380; *Spahos*, 207 F. Supp. 688; *Bobo*, 114 S.E. 2d 374. The nature of the election does not determine the standard of review; instead, the standard of review depends on whether the law *expands* or *restricts* the franchise, and whether it discriminates against similarly situated voters. There is no conflict between this Court's opinions and the Tenth Circuit's decision.

C. The Present Issue Rarely Arises.

Not since *Spahos* in 1962 has the present issue come before the Court, and only a handful of federal cases have addressed it since then. That few cases have addressed the issue confirms that it arises infrequently. Very few municipalities have chosen to enfranchise nonresident landowners, and there is no indication that the Tenth Circuit's decision will lead to additional municipalities doing so. Except for Chattanooga, Tennessee, only tiny resort communities which contain a high percentage

13. The Court has characterized these elections as relating to "the operations of traditional municipalities exercising the full range of normal governmental powers." *Ball v. James*, 451 U.S. at 367 n.11.

of vacation homes have extended the right to vote in general municipal elections to nonresidents. Accordingly, the Tenth Circuit's decision is not likely to have broad implication.

D. Even if the Present Issue Were Certworthy, this Would Not Be an Appropriate Case To Review because Petitioners Expressly Conceded Below that Strict Scrutiny Was Not the Appropriate Standard of Review.

Twice below Petitioners conceded that strict scrutiny did not and should not apply. First, in briefing before the district court, Petitioners conceded that "the standard usually applied in cases where over-inclusion in the franchise is claimed is the rational basis test."[14] Second, at oral argument on the parties' cross motions for partial summary judgment, Petitioners again conceded that strict scrutiny did not apply:

> THE COURT: Well, do you concede, Mr. Satlow [counsel for Petitioners], that I should apply the rational basis test under these facts?
>
> MR. SATLOW: No. I don't argue — I would love to argue for the strict scrutiny test. *I won't argue for it here.* I think the vast majority of courts have said that strict scrutiny doesn't apply. . . .

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14. Petitioners argued that "it would be appropriate to use an intermediate standard of scrutiny in cases involving vote dilution by alleged over-inclusion in the franchise in a general government," and suggested that this intermediate scrutiny test "might be borrowed from the gender cases." *See also* App. 2 at 6a. Petitioners never cited any authority to support their suggestion that the district court create new Equal Protection law in order to apply intermediate scrutiny to voting rights claims. There is no such authority.

Appendix 2 at 6a (emphasis added).[15] Having twice conceded below that strict scrutiny did not apply, Petitioners should not be heard to press that argument here. *See, e.g., Alexander v. Town & Country Estates, Inc.*, 535 F.2d 1081, 1082 (8th Cir. 1976); *Castleberry v. NRM Corp.*, 470 F.2d 1113, 1120 (10th Cir. 1972).

III. CONCLUSION

The petition should be denied.

Respectfully submitted,

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15. Petitioners filed the excerpt of the "Oral Argument Transcript of Proceedings" that is attached as Appendix 2 with the Tenth Circuit as part of their Appendix.

APPENDIX 1 — CONSTITUTION OF THE STATE OF COLORADO, ARTICLE XX, SECTION 6

Section 6. Home rule for cities and towns. The people of each city or town of this state, having a population of two thousand inhabitants as determined by the last preceding census taken under the authority of the United States, the state of Colorado or said city or town, are hereby vested with, and they shall always have, power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.

Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith.

Proposals for charter conventions shall be submitted by the city council or board of trustees, or other body in which the legislative powers of the city or town shall then be vested, at special elections, or at general, state or municipal elections, upon petition filed by qualified electors, all in reasonable conformity with section 5 of this article, and all proceedings thereon or thereafter shall be in reasonable conformity with sections 4 and 5 of this article.

From and after the certifying to and filing with the secretary of state of a charter framed and approved in reasonable conformity with the provisions of this article, such city or town, and the citizens thereof, shall have the powers set out in sections 1, 4 and 5 of this article, and all other powers necessary, requisite or proper for the government and administration of its local and municipal matters, including power to legislate upon, provide, regulate, conduct and control:

Appendix 1

a. The creation and terms of municipal officers, agencies and employments; the definition, regulation and alteration of the powers, duties, qualifications and terms or tenure of all municipal officers, agents and employees;

b. The creation of police courts; the definition and regulation of the jurisdiction, powers and duties thereof, and the election or appointment of police magistrates therefor;

c. The creation of municipal courts; the definition and regulation of the jurisdiction, powers and duties thereof, and the election or appointment of the officers thereof;

d. All matters pertaining to municipal elections in such city or town, and to electoral votes therein on measures submitted under the charter or ordinances thereof, including the calling or notice and the date of such election or vote, the registration of voters, nominations, nomination and election systems, judges and clerks of election, the form of ballots, balloting, challenging, canvassing, certifying the result, securing the purity of elections, guarding against abuses of the elective franchise, and tending to make such elections or electoral votes non-partisan in character;

e. The issuance, refunding and liquidation of all kinds of municipal obligations, including bonds and other obligations of park, water and local improvement districts;

f. The consolidation and management of park or water districts in such cities or towns or within the jurisdiction thereof; but no such consolidation shall be effective until approved by the vote of a majority, in each district to be consolidated, of the qualified electors voting therein upon the question;

g. The assessment of property in such city or town for municipal taxation and the levy and collection of taxes thereon for municipal purposes and special assessments for local improvements; such assessments, levy and collection of taxes and special assessments to be made by municipal officials or by the county or state officials as may be provided by the charter;

h. The imposition, enforcement and collection of fines and penalties for the violation of any of the provisions of the charter, or of any ordinance adopted in pursuance of the charter.

It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters and the enumeration herein of certain powers shall not be construed to deny such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right.

The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters.

All provisions of the charters of the city and county of Denver and the cities of Pueblo, Colorado Springs and Grand Junction, as heretofore certified to and filed with the secretary of state, and of the charter of any other city heretofore approved by a majority of those voting thereon and certified to and filed with the secretary of state, which provisions are not in conflict with this article, and all elections and electoral votes heretofore had under and pursuant thereto, are hereby ratified, affirmed and validated as of their date.

Appendix 1

Any act in violation of the provisions of such charter or of any ordinance thereunder shall be criminal and punishable as such when so provided by any statute now or hereafter in force.

The provisions of this section 6 shall apply to the city and county of Denver.

This article shall be in all respects self-executing.

APPENDIX 2 — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS DATED SEPTEMBER 18, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

96 D 126

JOAN MAY, et al.,

Plaintiffs,

vs.

TOWN OF MOUNTAIN VILLAGE, et al.,

Defendants.

ORAL ARGUMENT
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE WILEY Y. DANIEL, U. S. District Judge for the District of Colorado, beginning at 2:05 p.m. on the 18th day of September, 1996, in Courtroom C-200, United States Courthouse, Denver, Colorado.

APPEARANCES

For the Plaintiffs: Barry Satlow, Esq.
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For the Defendants: James David Reed, Esq.
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Appendix 2

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* * *

[22] THE COURT: Well, do you concede, Mr. Satlow, that I should apply the rational basis test under these facts?

MR. SATLOW: No. I don't argue — I would love to argue for the strict scrutiny test. I won't argue for it here. I think the vast majority of courts have said that strict scrutiny doesn't apply. First, I think under the rational basis test, I don't think there's a rational basis that's related to voting in general elections, and that's what it's about, not do they own property in the town, do they have an interest in the town, do they have a financial stake. That might apply for property tax elections. It certainly doesn't apply for voting for the town council. And otherwise, it says money buys a vote.

But we have argued that the Court should apply a different standard. Rational basis is clearly not appropriate if it allows anything. And when you deal not with which district overlaps which one and how many people and how much money goes back and forth and how many school programs or things of that sort are interrelated, but you're [23] dealing with a municipality, a general unit of government, there has to be a different test. And the test we've suggested is an intermediate level scrutiny, and I'll come to that. Before I leave the rational basis, let me say again no case has said, has approved voting by non-resident landowners in general elections where they don't live in the county where the town is located.

But with that said, let me go on to what we've urged. If the Court can't reject this practice under the rational basis test, and I think it should be able to, it should use an intermediate level of scrutiny. And that has been defined as a substantial relationship to an important governmental interest, and that's used in cases, principally gender, but in cases where the class is not suspect. We don't have a suspect class. But the use of the class, in effect, may be a distinction without a difference, and we've cited in our reply brief — and the rejoinder was that we had cited no cases. Well, there were cases cited there and that was kind of the last minute as we were putting the brief together, but I wanted to bring a couple cases that were cited there and just say very briefly what they did, although again they're in the treatise.

Craig v. Boron (phonetic), 429 U.S. 190 in 1976, and it threw out a statute prohibiting the sale of 3.2 beer to males under age 21, while females at the age of 18 could [24] buy it. *Mississippi University for Women versus Hogan,* 458 U.S. 718, 1982, threw out for women only nursing school admission practice. And *Orr v. Orr* at 440 U.S. 268 in 1979, threw out a statute providing for alimony for wives but never for a husband. And these all used a substantial relationship, there had to be an important governmental interest, and the practice or the statute had a substantial relationship, or substantial relationship to that.

The rational basis test is appropriate for general economic benefits, for what government does in general, for social and economic welfare, but not for individual rights like voting. And where you have a fundamental right, where you know residents have to be allowed to vote from a host of cases in general elections and school board cases, et cetera, to allow a great many non-residents in changes the franchise, changes it for them, limits their franchise, reduces their vote just as much as mal-apportionment does.

Appendix 2

And if you look at it in very linear terms and say every person who is allowed to vote gets the same vote, so it doesn't matter, it's not like not counting all their votes, which was the analogy used in the early reapportionment cases, it isn't like — you know, they could count us in, they get the same number of representatives. You could look at it that way, but that's a very rigid test.

What's really happening here is the votes of [25] residents are being reduced by half or more. And I wish I could go into Colorado law, because Colorado has never approved it, but let me say about Colorado law only this. Those cases — in all those cases, the state had either by the legislature approving a charter, as in Savannah Beach, or by statute, the state allowed this kind of voting, and again it was for non-residents who lived in the county. But the state approved the practice. The state hasn't approved anything. This isn't an experiment by the state. This is one town in the mountains of Southwestern Colorado saying we're home rule so we can do anything we want. If we were a special district, we know we couldn't do it, and we have a special — take a metro-services district or a metro district, and one of them I know is for the gondola, but I must say I have not — for the ski area, but I'm not completely familiar with it.

But they said we have a special district, they have to live in the State of Colorado to vote. The homeowners association doesn't get to make general rules. A special district doesn't get to make all kinds of general rules, whether criminal or civil, as long as they're local. You know, they're limited in their functions, and that's why the Supreme Court and other courts have given wide sway to hold voting can be done in special district. But there's something special about a town. There's some reason they wanted a town, there's something special in why the [26]

plaintiffs want to be able to control their own town, and they don't have to prove that the non-residents vote differently than they do. They just have to prove that non-residents don't live there, that they own — yes, they own a lot of property, but no, they don't — they haven't said I'm going to change my residence.

You don't have to live there year round, because residency is a matter of intent in Colorado, as in most states, you don't have to live there year round to be a resident. You have to say this is my home, if I'm Oprah Winfrey or Donald Trump and Sylvester Stallone or someone else and I live somewhere else, I live in New York part of the year and that's not my main home, I live in Philadelphia or Chicago or L.A. or wherever it is only part of the year, but that's not really my home. My home is Mountain Village and they declare it.

I don't think it's too much to ask people to get to vote, to declare this is my home, this is my community, I'm part of the community. Because otherwise, you have people whose stake is purely financial. And, again, they could do all those things through special district, all the things that are purely financial through special districts and homeowners associations.

So we urge the Court not to approve this practice and to stop it before it spreads and to stop it right here.

* * *